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No.

In the Supreme Court of the United States

October Term, 1984

KIPP ANDERSON, et al.,
Petitioners,

vs.

DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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10 pp

QUESTION PRESENTED

Whether, in light of the enactment of various statutes regulating removal of employees in the competitive service, the President exceeded his powers in directing the Respondent to remove air traffic controllers, including Petitioners found to have participated in a strike in violation of 5 U.S.C. §7311.

PARTIES

Petitioners are Kipp C. Anderson, Eugene M. Arnott, Robert P. Chamberlain, Jr., Paula J. Downs, William L. Ebeling, Merle M. Haas, Michael J. Haynes, Loyd G. Kaullen, Ralph J. King, Anthony M. Kolody, Michael J. Larkin, Curtis L. Lawson, George L. Middlemas, Jr., Theo A. Philbrick, Scott D. Plumb, Jeanette L. Ramirez, Kenneth J. Stramberg, Richard E. Voegele and Earl D. Zongker.

Respondent is the Department of Transportation, Federal Aviation Administration.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported at 735 F.2d 537 and is printed in Appendix A hereto, page A1. Opinions of relevant companion cases are also printed in Appendix A hereto beginning at pages A13 and A19. *DiMasso v. Department of Transportation, Federal Aviation Administration* is reported at 735 F.2d 526 and *Schapansky v. Department of Transportation* is reported at 735 F.2d 477.

The opinion of the Merit Systems Protection Board dated April 25, 1983 is printed in Appendix B beginning at page A40 and the opinion of the Presiding Official of the Merit Systems Protection Board, St. Louis Regional Office, dated December 2, 1982 is printed in Appendix C beginning at page A64. The judgment of the United States Court of Appeals for the Federal Circuit dated May 18, 1984 is printed in Appendix D beginning at page A87.

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit (Appendix D, *infra* page A87) was entered on the 18th day of May, 1984. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Art. II, Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by

granting Commissions which shall expire at the End of their next Session.

Art. II, Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

5 U.S.C. 2302(c). The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

5 U.S.C. §7513(a). Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

5 U.S.C. §7311. Loyalty and striking

An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

(4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia.

5 U.S.C. §7313. Riots and civil disorders

(a) An individual convicted by any Federal, State, or local court of competent jurisdiction of—

(1) inciting a riot or civil disorder;

(2) organizing, promoting, encouraging, or participating in a riot or civil disorder;

(3) aiding or abetting any person in committing any offense specified in clause (1) or (2); or

(4) any offense determined by the head of the employing agency to have been committed in furtherance of, or while participating in, a riot or civil disorder;

shall, if the offense for which he is convicted is a felony, be ineligible to accept or hold any position in the Government of the United States or in the government of the District of Columbia for the five years immediately following the date upon which his conviction becomes final. Any such individual holding a position in the Government of the United States or the government of the District of

Columbia on the date his conviction becomes final shall be removed from such position.

(b) For the purposes of this section, "felony" means any offense for which imprisonment is authorized for a term exceeding one year.

5 U.S.C. §7325. Penalties

An employee or individual who violates section 7324 of this title shall be removed from his position, and funds appropriated for the position from which removed thereafter may not be used to pay the employee or individual. However, if the Merit Systems Protection Board finds by unanimous vote that the violation does not warrant removal, a penalty of not less than 30 days' suspension without pay shall be imposed by direction of the Board.

STATEMENT OF CASE

Petitioners were members of the competitive civil service and were employed as air traffic controllers at the Olathe Air Route Traffic Control Center (ARTCC) in Olathe, Kansas. They were removed from their positions after they were found by the respondent to have participated in a strike against the United States which commenced on August 3, 1981. Petitioners appealed their removals to the Merit Systems Protection Board. After an adverse determination of the full Board on April 25, 1983, petitioners sought judicial review pursuant to 5 U.S.C. §7703(b)(1). On May 18, 1984, the United States Court of Appeals for the Federal Circuit, whose jurisdiction was invoked pursuant to 28 U.S.C. §1295(a)(9), affirmed the decision of the Merit Systems Protection Board upholding the removal of petitioners.

On August 3, 1981, a nationwide strike of air traffic controllers commenced. At 11:00 o'clock a.m. EST of the same day, the President publicly announced that air traffic controllers who failed to report for duty within 48 hours would be terminated. During press conferences which followed, then Secretary of Transportation Andrew Lewis, acknowledged that all controllers who were determined to be striking would be removed from their positions pursuant to the direction of the President. Following the President's statement, the Washington D.C. headquarters of the Federal Aviation Administration issued a number of general notice (GENOT) teletype messages to its regional facilities (including the Olathe ARTCC) implementing the President's directive. GENOT 127 stated, in part, as follows:

> The President has directed that FAA air traffic controllers not reporting for duty as scheduled after 11:00 A.M. EDT Wednesday or at the first shift thereafter to which they are directed or scheduled to report will receive termination notices.

Pursuant to this direction, the facility chief of the Olathe ARTCC, Rex McQueen, issued notices of proposed removal to petitioners after they failed to report for duty by their deadline shifts. After expiration of the period set aside for oral replies to the notices of proposed removal, Facility Chief McQueen issued notices of removal. During the hearing before the Presiding Official of the Merit Systems Protection Board, McQueen testified that he did not have the discretion of selecting a penalty other than removal if he determined that the petitioners had participated in a strike. He further testified that in determining strike participation, the only factor he considered was whether or not a given controller reported for duty by his deadline shift.

Petitioners challenged their removals, arguing that the respondent's action should be reversed for a number of reasons including the one asserted here; namely, that the President exceeded his powers in precluding the agency from selecting a penalty other than removal. Most of these arguments were also presented to the United States Court of Appeals for the Federal Circuit. The only issue of which petitioners seek review is whether the President exceeded his powers in directing the respondent to apply only the sanction of removal to those controllers, including petitioners, who were found to have participated in the strike. The United States Court of Appeals for the Federal Circuit decided this issue in the instant case by reference to its decisions in companion cases. For this reason, copies of relevant companion cases are included in the Appendix.

REASONS FOR GRANTING WRIT

Certiorari Should Be Granted To Decide An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By The Supreme Court Of The United States.

The issue of whether the President has the power to direct an agency to remove an employee in the competitive service who is found to have participated in a strike is one which has not been decided by this Court. The United States Court of Appeals for the Federal Circuit held in *Schapansky v. Department of Transportation, Federal Aviation Administration,* 735 F.2d 477 (1984) printed in the Appendix *infra* page A19, that the President's action was directly within his official responsibility to "take care that the laws be faithfully executed" pursuant to Article II, Section 3 of the United States Constitution. However,

in *Myers v. United States*, 272 U.S. 52, 135 (1926) this Court stated:

> There may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decision after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control.

The question presented here is whether a deciding official, in determining that an employee who strikes should be removed (as opposed to receiving a different or lesser sanction) acts in a quasi-judicial capacity and should be permitted, pursuant to *Myers, supra,* to operate free of explicit Presidential direction. Fairly included within this question is the subsidiary question of whether 5 U.S.C. §7311 mandates the removal of an employee determined to have participated in a strike. If removal is mandatory, then it follows that the actions of the President can be legitimately characterized as being directly within his official responsibility. If, on the other hand, a range of penalties for striking is permitted under 5 U.S.C. §7311, then the question arises whether the President has the power to direct the agency to take explicit action within that range.

Myers, supra, is generally cited for the proposition that in the area of *executive policy making,* a President may direct his subordinates choices within that range allowed by statute. See *American Federation of Government Employees v. Carmen,* 669 F.2d 815, 823 (D.C. Cir. 1981); *National Federation of Federal Employees Local 1622 v. Brown,* 645 F.2d 1017, 1022 n. 11 (D.C. Cir. 1980). Accordingly, in situations where Congress has assigned a particular function to an executive agency, it has been noted

that a president is not necessarily precluded from initiating action, *unless* the function in question is so "peculiarly and specifically committed to the discretion of a particular officer" as to suggest that the president avoid initiation of a particular function. See *American Federation of Government Employees v. Carmen, supra.*

With respect to the removal of employees in the competitive service, Congress, through the enactment of 5 U.S.C. §7513 and 5 U.S.C. §2302(c) has committed solely to agencies "executive" or otherwise, the responsibility for removing employees who are in the competitive service. The question, therefore, arises whether the decision to remove an employee in the competitive service is so "peculiarly and specifically committed to the [employing agency]" as to preclude the President from directing the agency to initiate removal proceedings. Stated in terms of the instant case, the question is whether or not the President, in directing the agency to fire controllers, including petitioners found to be striking, intruded upon a function "peculiarly and specifically committed" to the Federal Aviation Administration.

This issue is one of national significance and is squarely presented by the instant case.

The subsidiary question of whether striking against the United States mandates removal is likewise undecided. 5 U.S.C. §7311 literally precludes one who strikes against the government from "accepting or holding" a position. 5 U.S.C. §7313, a companion statute, likewise precludes persons convicted of certain offenses relating to riots and civil disorders from accepting or holding a position and further provides that an employee, upon conviction of such a crime, if it is a felony, "be removed from such position". Also, 5 U.S.C. §7325 mandates the removal of a federal employee who violates the Hatch Act (unless the Merit

Systems Protection Board decides otherwise by unanimous vote). Thus, it appears that when Congress desires that an agency have no discretion with respect to the penalty of removal, it so states in explicit terms. Thus, the issue is presented whether the absence from 5 U.S.C. §7311 of language specifically mandating removals suggest that Congress intended the agencies to have some degree of flexibility in dealing with striking employees. The Federal Circuit declined to decide specifically the question of whether 5 U.S.C. §7311 mandates removal on the grounds that the penalty was "appropriate". Petitioners suggest, however, that this Court can and should address this issue in determining whether the President exceeded his powers in directing the respondent to remove striking federal employees.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 83-1153.

KIPP ANDERSON, ET AL.,*
Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, FAA,
Respondents.

DECIDED: May 18, 1984

Before MARKEY, *Chief Judge,* FRIEDMAN, RICH, SMITH, and NIES, *Circuit Judges.*

NIES, *Circuit Judge.*

The petitioners of this appeal are former air traffic controllers employed at Olathe Route Air Traffic Control Center (ARTCC) in Olathe, Kansas. As in the related cases decided today, petitioners seek reversal of a decision by the Merit Sys ems Protection Board (board) upholding the adverse actions taken by the Department of Transportation's Federal Aviation Administration against each of the petitioners.

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*The names of the petitioners in Appeal No. 83-1153 are listed in the appendix. Petitioner Robert L. Potty, Appeal No. 83-1157, shall notify the court within 14 days of the date of this opinion of his intent to withdraw or further prosecute his appeal. *See Adams v. Department of Transportation, FAA,* No. 83-1155, slip op. at 13-15 (Fed. Cir. May 18, 1984).

The petitioners here raise numerous issues which have been treated in other opinions issued today, including:

1. The agency failed to make a *prima facie* case of the charge of striking and erred in shifting the burden to each petitioner to prove he was not striking. *See Schapansky v. Department of Transportation, FAA,* No. 83-663, slip op. at 9-14 (Fed. Cir. May 18, 1984).

2. The deadline shift rule created confusion with respect to individual deadlines and rebuts the *prima facie* case that an individual was striking. *See Adams v. Department of Transportation, FAA,* No. 83-1155, slip op. at 4-7 (Fed. Cir. May 18, 1984).

3. Actions by the President and high administration officials were unlawful and deprived petitioners of a meaningful opportunity to reply. *See DiMasso v. Department of Transportation, FAA,* No. 83-1158 slip op. at 5-7 (Fed. Cir. May 18, 1984).

4. Petitioners were unlawfully suspended and improperly required to show that they were ready, willing and able to return to work. *See Adams,* slip op. at 9-11 (Fed. Cir. May 18, 1984). (Of petitioners in this appeal, only Kolody was found to have been wrongfully suspended.)

5. The agency failed to take all factors into consideration in imposing penalty. *See Schapansky,* slip op. at 14-17.

6. Implementation of deadline shift rule resulted in disparate treatment. *See Schapansky,* slip op. at 17.

The record in this appeal requires further consideration of the second issue listed above, i.e., confusion cre-

ated by the deadline shift rule. An amicus brief was filed on this issue and, unlike the *Adams* case, individual controllers here testified concerning their confusion. In addition, several petitioners raise issues dependent on the special circumstances of their individual situations.

I

As an initial matter, we hold that substantial evidence, as detailed in the presiding official's decision and affirmed by the board, establishes that the strike continued at the Olathe ARTCC at least through August 12, 1981.

II

Confusion Over Deadline

On August 3, 1981, at 7:00 a.m. E.D.T. the Professional Air Traffic Controllers Organization (PATCO) called upon its members to participate in a nationwide strike against the FAA. After the strike began, each of the petitioners was sent a telegram which stated:

> AN ILLEGAL STRIKE IS IN PROGRESS. PARTICIPATION IN A STRIKE CAN RESULT IN SEVERE DISCIPLINARY ACTION, INCLUDING REMOVAL AND POSSIBLE CRIMINAL PENALTIES. ANY UNAUTHORIZED ABSENCE FROM THE FACILITY WHEN SCHEDULED OR DIRECTED TO REPORT FOR DUTY INDICATES THAT SUCH PERSONS ARE PARTICIPATING IN THE STRIKE. ALL CONTROLLERS ARE TO REPORT FOR DUTY FOR THEIR SCHEDULED SHIFTS UNLESS DIRECTED OTHERWISE BY FACILITY MANAGEMENT.

The public announcement by the President on August 3, 1981, at 11:00 a.m. E.D.T. stated, in part:

> I must tell those who failed to report for duty this morning they are in violation of the law and if they do not report for work within 48 hours they have forfeited their jobs and will be terminated.

The agency implemented the President's 48-hour deadline by sending a notice of proposed removal to each controller who failed to report for duty at the first shift to which the controller was directed or regularly scheduled to report after 11:00 a.m. (E.D.T.) August 5, 1981.

None of the petitioners of this appeal ever again reported for duty at the Olathe ARTCC (except Kolody) and none of them called the facility to explain their absence.

The petitioners here argue that they thought they were fired as of the 11:00 a.m. (E.D.T.) deadline, and this "prevented controllers who otherwise would have returned to duty from so returning in a timely fashion." While phrased somewhat differently, this is, in essence, the argument characterized in *Adams,* slip op. at 5, as "disingenuous." It does not change its nature by virtue of testimony of individual controllers that they were confused. No steps were taken by these individuals to clear up any ambiguity as to their individual final deadlines. Petitioners say their inaction should be excused because, had they contacted the center to clear up any ambiguity about their deadline, they would have been ordered to come in before their deadline. In petitioners' view, it follows that the Government was obligated to contact each petitioner to clear up any ambiguity.

Contrary to petitioners' argument, the grace period granted by the President did not relieve controllers of all obligations to their employer during the grace period. Thus, petitioners' premise that the controllers were fired

only for their failure to report for their deadline shift, and not for conduct prior thereto, is false. Manifestly, confusion as to the deadline shift cannot excuse anyone's failure to report when scheduled before the deadline.

Amicus' reliance on *Olshock v. Village of Skokie,* 411 F. Supp. 257 (N.D. Ill.), *aff'd,* 541 F.2d 1254 (7th Cir. 1976), (Wood, J., dissenting) is misplaced as authority for its argument that discharges under the deadline shift rule are not in conformity with constitutional rights. In *Olshock,* the governmental authority attempted to justify the disparate punishments, discharge vis-a-vis suspension, meted out to striking policemen. The Government argued that the punishment depended on whether a policeman returned to duty before or after a July 13 deadline. In rejecting that defense on the facts and holding that the difference could only be attributed to other reasons, the court noted, *inter alia*:

> Nowhere does the record or the findings indicate that the discharged men were advised by anyone that July 13 was a crucial deadline between future professional life and death.

Unlike the Skokie policemen, the controllers here were treated evenly. And most importantly, none of the petitioners here assert that they were unaware of a deadline to the grace period. Their purported confusion was only that it was somewhat later than 11:00 a.m. E.D.T. on August 5.

With respect to the argument that notice was required to prevent deprivation of part of their grace period, this position was rejected in *Adams,* slip op. at 7:

> Having disregarded the initial 48 hours moratorium, petitioners can hardly complain that they were not

> specifically and personally notified that each had an opportunity to also disregard an extension of that moratorium. There is nothing whatever of record to indicate that any petitioner would have returned or had any interest whatever in returning to work at the time of his next regularly scheduled shift.

In these appeals as well, the argument is simply an argument without factual support.

Lester E. Cooke, Jr.

Petitioner Cooke asserts that the board erred in ruling that he had not been denied an opportunity to present an oral reply to the notice of removal, and that, in any event, such denial would not have constituted a harmful error. Petitioner Cooke testified that a call was made to him, scheduling his oral reply for 9:15 a.m. and that he showed up no later than that time only to learn that his reply time had been commenced at 9:00 a.m. and was concluded. A union representative had, however, appeared on his behalf at 9:00 a.m. The FAA refused to schedule another time to hear his oral reply. Mr. Cooke stated that only then did he agree to permit the presentation made by the union representative to constitute his oral reply, rather than presenting none. He testified that if he had been afforded a reply he would have raised the defenses considered by the presiding official at the subsequent hearing, i.e., that he was confused as to his individual deadline; that he was fearful about returning to the facility because he had seen a controller hauled off in shackles in South Carolina by law enforcement officers; and because he was afraid for the flying public and could not in good conscience perform his duties. These arguments *were* made by other petitioners in this appeal.

The agency submitted a document signed by an agency employee, C.B. Hooper, which indicates that Mr. Hooper contacted petitioner Cooke on August 15, 1981, and scheduled his oral reply for August 18, 1981, at 9:00 a.m. The presiding official found that petitioner Cooke had actual notice of the time of his oral reply. Considering the record as a whole, it cannot be said that substantial evidence does not support this finding.

Accordingly, the finding cannot be set aside under 5 U.S.C. § 7703(c)(3).

Thomas G. Downs

Petitioner Downs did not present an oral reply before the agency. He asserts that he did not personally receive the notice of proposed removal until August 14, 1981, and, therefore, believed that he had until August 21, 1981, to request an oral reply time. His oral reply request was received by the agency on August 20, 1981, but was held to be untimely. The basis for this ruling was that the notice was sent to the mailing address furnished by petitioner and was signed for by his mother on August 10, 1981. It was held, therefore, that the August 10, 1981, date was the date of constructive receipt. This ruling is in accordance with precedent of this court and is affirmed. *Ramos v. United States,* 683 F.2d 396 (Ct.Cl. 1982).

Robert P. Chamberlain, Jr.

Petitioner Chamberlain asserts that the MSPB erred in holding that he did not rebut the Government's *prima facie* case that he was on strike by his testimony that during the strike period he was physically incapable of performing his duties.

Chamberlain testified that due to an allergic flare-up, he began taking disqualifying medication on August 3,

1981, and that the presiding official and the board could not reject uncontroverted testimony on the basis of lack of credibility. Admittedly, Chamberlain did not report his illness to the agency, and his testimony with respect to illness during the strike period was uncorroborated. There is, however, also no question but that routinely requests for sick leave were denied during the strike. Accordingly, Chamberlain asserts that a request for sick leave would have been a futile gesture and that he feared the agency would believe that he was intentionally disqualifying himself if he called in sick.

The board recognized that from time to time, over a three year period, Chamberlain was bothered by an allergy that sometimes required him to take medication which disqualified him for air traffic control duties. However, in the past, Chamberlain had performed administrative duties at such times. The board could not accept Chamberlain's rationale that reporting illness or appearing only for administrative duty would more likely be interpreted as strike-support than a complete failure to report.

On appeal, Chamberlain asserts that his fear was that he would be forced to work traffic, notwithstanding his medication, and that the board failed to appreciate this defense. We do not see in the board's decision a lack of comprehension of this defense, but rather, a total rejection of his assertion that he was ill. As the board noted, despite opportunities during the reply process and in his petition for appeal, he failed to indicate that he was ill at the time of the strike. Indeed, Chamberlain did not put forth this reason for not appearing for duties until the spring of 1982.

Accordingly, considering the record as a whole, it cannot be said that substantial evidence does not support the board's decision.

Anthony M. Kolody

On August 8, 1981, two days prior to his receipt of the notice of proposed removal, petitioner Kolody requested the assistance of a facility training instructor, Ed Boeger, to facilitate his return to work. Boeger arranged an informal meeitng at the facility later that day with facility Chief Rex McQueen, at which time Kolody informed McQueen that he wanted to return to work. Before the presiding official, Kolody asserted that he had been promised by McQueen at that meeting that he would have only a 10-day suspension. McQueen testified that he did tell Kolody that he had a good case, but he denied ever promising Kolody that he would receive only a suspension. The presiding official found McQueen more credible than Kolody. Before the MSPB, Kolody had argued that McQueen's actions created an estoppel to removal.

On appeal, the conversation with McQueen is relied upon to support Kolody's argument that he never presented a "meaningful reply" to the notice of proposed removal. He asserts that McQueen's assurances that the hearing would be no more than a formality to his reinstatement led him to appear without counsel.

Other evidence of record concerning the conversation between Kolody and McQueen, provided by Boeger, supports McQueen's version of what happened at the interview. Specifically, Boeger testified that McQueen did not tell Kolody that he would get his job back but rather said that Kolody would have to go through the oral hearing, and that he had as good a case as anyone. We do not find in these statements any assurance that the oral reply would be a mere formality. Boeger's supplemental affidavit proffered to the board does not contradict his earlier testimony.

Accordingly, there is no basis for Kolody's defense that McQueen's actions effectively deprived him of a meaningful reply to the agency. Nor was he prevented from raising any defense at his hearing before the presiding official. Indeed, it is noted that Kolody was successful in his charge that he was improperly suspended after appearing for duty on August 8, and thus he was found entitled to pay from the 8th until his termination date.

John S. Sellers

Petitioner Sellers seeks a remand for the purpose of presenting additional evidence in support of his testimony before the presiding official that prior to his actual deadline, he was informed by his supervisor, Assistant Chief Joe West, that he was fired. As a result of that conversation and his lack of awareness of his deadline shift, he believed it was futile to attempt to return to work. West testified that he did talk to Sellers and others on the picket line on August 5, 1981, and told them if they did not come to work they would be fired. West specifically denied telling Sellers that he had already been terminated. The board held that Sellers's challenge to the presiding official's determination that West was the more credible witness did not merit review. With respect to the affidavits proffered with the petition for review as newly discovered evidence, the board held that the affidavits did not raise a serious evidentiary question in light of the fact that Sellers did not mention the alleged conversation with West at any time prior to the hearing despite numerous opportunities to do so. The board noted that in answers to interrogatories, Sellers stated that he believed he had been terminated on August 5, 1981, at 10:00 a.m. C.D.T. (11:00 a.m. E.D.T.) because of statements of the President and the Secretary of Transportation.

At no time did he refer to the conversation with West or indicate that it was the basis for his belief that he had been fired.

While one of the affidavits concerned an event that occurred after the hearing and may, therefore, qualify as newly discovered evidence, we do not find that the board abused its discretion in refusing to reopen Seller's hearing for the receipt of the additional evidence, inasmuch as the board adequately explained and, in our view, justified its decision not to do so. The request for a remand is denied.

Stephen L. Miller

On appeal, for the first time, petitioner Miller raises the issue that his annual leave was wrongfully cancelled on August 2, 1981, because the cancellation was not in compliance with the terms of the collective bargaining agreement. Thus, Miller argues that the charge that he was striking on days when he was properly on leave cannot be sustained. This defense has been rejected in *Letenyei v. Department of Transportation, FAA,* No. 83-1174 (Fed. Cir. May 18, 1984), and *Campbell v. Department of Transportation, FAA,* No. 83-1173, slip op. at n.5 (Fed. Cir. May 18, 1984), also decided today and, thus, we need not consider the Government's assertion that the issue was not properly raised by Miller.

DECISION

Accordingly, the board's decision sustaining the removal of petitioners in this appeal is *affirmed.*

AFFIRMED

Appendix

Mr. Kipp C. Anderson
Mr. Eugene M. Arnott
Mr. Thomas E. Bertels
Mr. Gerard A. Blume
Mr. Robert P. Chamberlain, Jr.
Mr. Lester E. Cooke, Jr.
Ms. Paula J. Downs
Mr. Thomas G. Downs
Mr. Larry A. Drury
Mr. William L. Ebeling
Mr. Steven C. Flynn
Mr. James W. Fuester
Mr. Merle M. Haas
Mr. William R. Harms
Mr. Michael J. Haynes
Mr. Michael W. Ingle
Mr. Loyd G. Kaullen
Mr. Ralph J. King
Mr. Anthony M. Kolody
Mr. Michael J. Larkin
Mr. Curtis L. Lawson
Mr. Ronald J. McNeel
Mr. George L. Middlemas, Jr.
Mr. Stephen L. Miller
Mr. Gary E. Nelson
Mr. Rex A. Olsen
Mr. Theo A. Philbrick
Mr. Scott D. Plumb
Ms. Jeanette L. Ramirez
Mr. James E. Richards
Mr. John S. Sellers
Mr. Kenneth J. Stramberg
Mr. Richard E. Voegele
Mr. Earl D. Zongker

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 83-1158

ANTHONY L. DiMASSO,
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FAA,
Respondent.

DECIDED: May 18, 1984

Before MARKEY, *Chief Judge*, FRIEDMAN, RICH, SMITH, and NIES, *Circuit Judges*.

SMITH, *Circuit Judge*.

Petitioner Anthony L. DiMasso (DiMasso) appeals from a decision of the Merit Systems Protection Board (board), affirming the decision of the Department of Transportation's Federal Aviation Administration (agency) to remove DiMasso from his position as air traffic controller specialist at the New York Air Traffic Control Center in Ronkonkoma, New York. We affirm.

Background

General background concerning the facts and issues arising from the agency's removal of air controllers who participated in an illegal strike is set forth in *Schapansky v. Department of Transportation*, No. 83-663, slip op. (Fed. Cir. 1984), and *Adams v. Department of Transportation*, No. 83-1155, slip op. (Fed. Cir. 1984), issued this day. In

DiMasso's case, DiMasso was on annual leave between August 2 and 9, 1981, and was scheduled to return to his 4 p.m. shift on August 9. When he failed to do so, the agency served him the next day with a notice of proposed removal, alleging participation in an illegal strike and absence without leave. DiMasso responded on August 13 and 14, 1981, requesting an extension of time, excepting to application of the statutory crime provision, and requesting certain additional information. He did not, however, either at this point or subsequently in the proceedings offer reasons or evidence for his failure to return to his scheduled shift on August 9. The agency removed DiMasso effective August 27, 1981, and he appealed to the board which, in an initial consolidated decision by the presiding official dated October 14, 1982, affirmed the removals of all but one of the air controllers whose removals from the New York Air Traffic Control Center were considered.[1] DiMasso appealed to the full board which, in a final consolidated decision issued April 25, 1983, likewise affirmed his removal.[2] DiMasso now exercises his right to appeal to this court.

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1. The board's presiding official found that a preponderance of the evidence did not support the charge of striking for one controller who had been on sick leave. *Adams v. Federal Aviation Admin.*, MSPB Initial Decision No. NY075281F0424 (Oct. 14, 1982). The agency did not contest that finding.

2. *Adams v. Department of Transp.*, MSPB Docket No. NY-075281F0424 (Apr. 25, 1983), 1983 FMSR 7019. The full board found that the agency failed to establish by a preponderance of the evidence that two controllers involved in that appeal participated in a strike and were absent without leave, because opposing evidence indicated that they were on jury duty under court leave at the time.

Issues

DiMasso has raised numerous issues before this court, including: (1) that the agency failed to sustain its burden of proof as to every element of the charges; (2) that the board erred in shifting the burden of persuasion once the agency had shown a prima facie case of strike participation; (3) that the agency introduced only hearsay evidence insufficient to make a prima facie case; (4) that the board erred in drawing an adverse inference from DiMasso's silence; (5) that the agency erred in applying an emergency suspension; (6) that the agency erred in allowing DiMasso less than 7 days to respond to the notice of removal; (7) that the penalty of removal did not promote the efficiency of the service; (8) that the penalty should be mitigated; (9) that the deadline shift rule created such confusion as to cause the agency's burden of proving strike participation to rise; (10) that the agency erred in failing fully to apprise DiMasso of his constitutional right against self-incrimination; and (11) that the President's edict and cabinet level orders to the proposing and deciding officials improperly influenced DiMasso's removal, causing harmful error. Except for the last two issues, this court has thoroughly considered and rejected those arguments in other cases decided today.[3] Those decisions control, and we address the remaining two issues here.

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3. In the order to which they relate to each issue enumerated above, those cases, likewise entered today, are: (1) *Schapansky v. Department of Transp.*, No. 83-663, slip op. (Fed. Cir. 1984); (2) *Schapansky;* (3) *Dorrance v. Department of Transp.*, No. 83-1152, slip op. (Fed. Cir. 1984); (4) *Adams v. Department of Transp.*, No. 83-1155, slip op. (Fed. Cir. 1984); (5) *Schapansky; Novotny v. Department of Transp.*, No. 83-1161, slip op. (Fed. Cir. 1984); (6) *Adams;* (7) *Schapansky; Johnson v. Department of Transp.*, No. 83-664, slip op. (Fed. Cir. 1984); (8) *Schapansky;* and (9) *Adams.*

Opinion

1. *Duty to Advise on Self-Incrimination*

DiMasso contends that the agency committed harmful error by failing fully to apprise him of his constitutional right against self-incrimination under the fifth amendment. In support of such duty by the agency he cites a memorandum dated June 4, 1980, by then-Attorney General Benjamin Civiletti, outlining general guidelines for procedures in administrative investigations of certain employee misconduct and discussing the necessity for warnings on fifth amendment rights to prevent loss of evidence. Need for the memorandum arose, as it states in its first sentence, from "the need to coordinate with the Criminal Division [of the Department of Justice] certain actions that may impact adversely on the prosecution of criminal cases arising out of the same or parallel facts." Specifically, the Attorney General was concerned that improper agency procedures during administrative investigations of employee misconduct would result in statements and evidentiary leads arising from those investigations subsequently being held inadmissible as evidence in a criminal prosecution of that employee.

In DiMasso's situation, his opportunity to respond to a notice of proposed removal did not reach the level of a custodial interrogation. He was not compelled to give testimony as a *quid pro quo* for retaining his job; he was free to deny participation in an illegal strike but chose not to do so. Moreover, even if one were to assume that the Attorney General's memorandum was binding (which it was not), then the probable consequences of an agency's failing to follow that document would be felt not in these civil removal proceedings but in any subsequent criminal

investigation.[4] We affirm the board in its rejection of DiMasso's position on the duty to advise.

2. *Influence from Above*

DiMasso also contends that the President's statement on August 3, 1981, that striking air controllers who had not returned to work by 11 a.m. August 5, 1981, would be fired, preempted the authority of the board's presiding official and "improperly aborted" the statutory and regulatory removal procedures. He contends as well that follow-up orders by the Secretary of Transportation and others confirming and detailing the President's position likewise predetermined the outcome of his case, making it, in effect, a sham. In DiMasso's view these procedures, directed from the "top down," constituted harmful error.

In *Schapansky,* we considered DiMasso's contention along with the more specific charge that the President's announcement in effect deprived individual controllers of a meaningful opportunity to reply to the proposed removal, and do not repeat that discussion here. We note that in the cases of certain controllers who denied the striking charges and presented evidence thereof, the board's consideration resulted in reversal of the agency's position.[5] We reiterate as well that this court is bound by Court of Claims precedent,[6] which has held that there is "nothing improper" about an agency's predetermining the penalty of removal, provided that the employee has full opportunity to present facts rebutting the charges.[7] DiMasso chose not

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4. *Garrity v. New Jersey,* 385 U.S. 493 (1967).

5. *See, e.g.,* notes 1 and 2, *supra.*

6. *South Corp. v. United States,* 690 F.2d 1368, 215 USPQ 657 (Fed. Cir. 1982).

7. *Pascal v. United States,* 543 F.2d 1284, 1289 (Ct. Cl. 1976).

to present evidence rebutting the charges of illegal strike participation and absence without leave; he instead chose to respond with "a blast of procedural objections."[8] Having rejected those objections, we affirm the board's decision upholding the agency's removal of DiMasso.

AFFIRMED

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8. *Id.* at 1288.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 83-663

ROY L. SCHAPANSKY,
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FAA,
Respondent.

DECIDED: May 18, 1984

Before MARKEY, *Chief Judge,* FRIEDMAN, RICH, SMITH and NIES, *Circuit Judges.*

MARKEY, *Chief Judge.*

Appeal from a decision of the Merit Systems Protection Board (Board), Docket Number DA075281F1130, sustaining the August 26, 1981, permanent removal of Roy L. Schapansky (Schapansky), by the Department of Transportation's Federal Aviation Administration (agency) from his position as Air Traffic Control Specialist at the Air Route Traffic Control Center in Fort Worth, Texas. We *affirm.*

BACKGROUND

Removal was based on charges of participation in strike against the United States from August 3 to August 5,

1981, absence without leave for the same period, and violation of the "loyalty and striking" provision of 5 U.S.C. § 7311.[1] Schapansky appealed to the Board's Dallas Regional Office, which sustained the removal on May 14, 1982. On timely petition for review, the full Board affirmed the presiding official's decision and sustained Schapansky's removal on October 28, 1982.

Presiding Official

The presiding official determined that the agency had established by a preponderance of the evidence: (1) that Schapansky was a member of the union, the Professional Air Traffic Controllers Organization (PATCO); (2) that he was aware of the strike by the members of PATCO; (3) that he intended to and did participate in that strike by refusing, in concert with others, to provide his services to his employer; (4) that the agency did not err in applying the statutory provision of 5 U.S.C. § 7513(b)

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1. "§ 7311. Loyalty and striking

An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

(4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia."

(1);[2] (5) that the agency was correct under § 7513(b)(1) in disregarding the requirement for 30 day notice before deciding upon and effecting an adverse action because it had "reasonable cause to believe the employee ha[d] committed a crime" and because 18 U.S.C. § 1918[3]

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2. Section 5 U.S.C. § 7513 provides, in pertinent part:

"§ 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date."

3. "§ 1918. Disloyalty and asserting the right to strike against the Government

Whoever violates the provision of section 7311 of title 5 that an individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

(4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia;

shall be fined not more than $1,000 or imprisoned not more than one year and a day, or both."

makes striking by federal employees a crime; (6) that once an agency invokes § 7311, removal of the employee is mandatory; and (7) that removal was required to promote efficiency of the service under § 7513(a).

Board

Before the Board, Schapansky reiterated his basic contention that no evidence supported a finding that he had participated in the strike. He conceded that he was absent without leave on August 3, 4, and 5, 1981, and that his absence was a protest against the same conditions that other PATCO members were protesting by withholding their services. Schapansky said other PATCO members were "thinking different", but he viewed his absence as a legal protest and PATCO's "lawyers would take care of it." The presiding official, in finding that Schapansky was aware of and intended to participate in the strike, cited Schapansky's own testimony that he voted "yes" when a "strike vote" was taken by PATCO members on August 2, 1981, and that the agency had informed him that the strike would be in violation of law. The Board found no basis on which to disagree with the presiding official's finding or assessment of the hearing testimony.

The Board noted that Schapansky in his petition for review neither challenged the presiding official's discrediting of his assertion that he was absent because of harassment and fear for his personal safety, nor asserted any other basis on which his absence might be determined to have been involuntary.

Schapansky challenged the agency's consideration of a photograph showing him among PATCO picketers, saying he is not shown as carrying a sign and that nothing

showed him among picketers on August 3 or 4. The Board said that voluntary withholding of services in concert with others, not physical presence on a picket line, constitutes the gravamen of the charge. Schapansky's challenge of the photograph was therefore found unavailing.

On the merits of the basic charges, the Board held that the agency had proved the charges, that Schapansky had not rebutted the evidence of his knowledge of the strike and of his intent to withhold his services along with other PATCO members, and that he had made no showing that his absence was due to any factor other than strike participation.

Objecting to the absence of a 30-day advance written notice, Schapansky argued that he had not been formally charged with or convicted of a crime and that the agency had not proved his intent to do anything illegal. The Board pointed out that it has not adopted criminal charges, convictions, or proof of illegal intent as prerequisites to a finding of "reasonable cause to believe" that a crime had been committed in support of a decision to disregard the notice provision. The Board went on to say that because § 1918 makes participation in a strike against the United States a felony punishable by up to one year and a day of imprisonment, and because Schapansky's conduct evidenced such participation, it would sustain the finding that the agency had reasonable cause to believe that a crime had been committed and that disregard of the notice requirement was thus permissible under § 7513(b)(1).

Reading § 7311(3) as mandating removal when a charge of striking is sustained, the Board rejected Schapansky's contention that removal was unreasonable. The

Board further noted the self-evident gravity of Schapansky's offense in participating in a strike against the Government, that by its very nature such action disrupts the Government's performance of its mission, that it is a criminal offense, that the position of air traffic controller is highly sensitive, the incumbent being directly responsible for the safety of passengers, and that that responsibility entails maintenance of the confidence of his employer and the public who rely on him. The Board viewed a controller's intentional and ongoing abdication of that responsibility, by participating in the strike and by continuing to strike despite the President's 48-hour grace period,[4] as constituting particularly egregious conduct which destroyed the controller's unique relationship of trust. The Board therefore held that the agency's removal penalty cannot be deemed excessive, disproportionate, or unreasonable.

Sustaining the finding that removal will promote the efficiency of the service, § 7513(a), the Board determined that § 7311 reflects the belief of Congress that removal of an employee for participation in a strike promotes that efficiency, and that there is a clear and direct relationship of such misconduct to the employee's satisfactory accomplishment of his duties and to the agency's ability to fulfill its mission.

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4. At approximately 11:00 a.m. E.D.T. on August 3, 1981, the President of the United States announced:

> This morning at 7:00 a.m. the union representing those who man America's air traffic facilities called a strike.—I must tell those who failed to report for duty this morning they are in violation of the law and if they do not report for work within 48 hours, they have forfeited their jobs and will be terminated.

While more than 1,200 controllers heeded the President's call to return to work; approximately 11,500 continued to strike. 17 Weekly Comp. of Pres. Doc. 845 (August 3, 1981).

Issues[5]

(1) Whether the Board correctly determined that the agency proved the charges by a preponderance of the evidence.

(2) Whether the penalty of removal was too harsh and unreasonable and should be mitigated.

(3) Whether the removal here was effected with harmful procedural error.

OPINION

(1) *The Charges*

In discussing the issues, the briefs of Schapansky and *amici* cite the language of court opinions dealing with matters and questions totally divorced from those in a case dealing with the propriety of the government's action in removing those who strike against it. We join enthusiastically in the general desire for symmetry in law and procedure, and nothing here said is thought to make a fundamental difference in either (except perhaps for recognition that mitigation is irrelevant when striking is proved, *infra*). Nonetheless, the facts of this case, and the

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5. Because this and nine other "lead" cases involving air controllers were argued before the same panel on the same day, counsel were permitted to present issues which may not have been presented to the Board in the particular case argued by counsel, but which had been presented to the Board in one or more of the lead cases.

Similarly, the court has taken judicial notice, at Schapansky's request, of the materials in his Supplemental Appendix, the Board having considered major segments of that appendix in another lead case.

Briefs *amicus curiae* were received from three sets of counsel collectively representing many hundreds of air controllers whose cases are described by *amici* as likely to be controlled by the outcome in this case. Issues and arguments presented by *amici* in this case are addressed here.

differences between them and those in other types of cases, are such as to render without purpose a discussion here of the many other types of cases cited in the briefs.

The Board properly held that though the agency could establish a *prima facie* case of striking by showing an employee's unauthorized absence during a strike of general knowledge and his presence on the picket line, the latter element is not essential, and the charge of striking is proven when it is shown that the employee withheld his services in concert with others, regardless of whether the employee joined a picket line. *See United Federation of Postal Clerks v. Blount*, 325 F. Supp. 879, 884 (D.D.C.), *affirmed*, 404 U.S. 802 (1972). The Board did not, as *amici* assert, accept mere absence during a strike as proof of the charges. On the contrary, as appears below, it took into account all of the facts and circumstances. The Board's decision was not even remotely "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law . . ." 5 U.S.C. § 7703(c).

The record demonstrates unequivocally that the strike was well and widely known, that Schapansky knew it was illegal to strike against the government, that he knew FAA considered PATCO's "job action" an illegal strike, that his absence was unexplained, that he never attempted to contact the agency to advise it of any reason for his absence, and that under the circumstances his absence constituted evidence of participation in the strike. Proof of a wide-spread strike of general knowledge, together with proof of Schapansky's absence without authorization or explanation during the strike, must in the practical world constitute at least a *prima facie* case of his participation in the strike.

Once an agency has made a *prima facie* showing, the burden of going forward with evidence to rebut that

showing necessarily shifts to the employee, who is in the best position to present explanatory evidence to counter that showing. The burden of proving the charge by preponderance of the evidence is and remains throughout upon the agency. The order of presentation, however, is allocated in such a way that each party is required to give evidence in the area in which it has the better access to information. It may be that little countering evidence would be required, where, for example, the *prima facie* case was minimally supported. We need not discuss that relationship here, however, for the *prima facie* case here was more than minimally supported and Schapansky submitted no evidence effective to counter it.

The agency's burden of proof respecting strike participation may be described as a burden of "persuasion", because it has "in form the affirmative allegation" and must bear the burden of persuasion from start to finish. *See,* 9 J. Wigmore, *Wigmore on Evidence* 2486, 2489 (J. Chadbourn rev. ed. 1981).

Schapansky points to language in the Board's opinion in which it appeared to be placing a burden of persuasion on him. It is clear, however, from a reading of the challenged phrase in the context of the entire opinion that the Board in actuality placed a burden of production, not persuasion, on Schapansky following presentation of the agency's *prima facie* case. The Board specifically stated that it required the agency to "ultimately establish" the employee's participation in a strike. Thus the Board did not, as Schapansky asserts, craft some new approach for use in his case.

Absent effective rebuttal, the agency must be held to have carried its burden of persuasion. Schapansky concedes that the agency demonstrated existence of the

strike and his absence during it without authorization or explanation. It is undisputed that Schapansky offered no evidence before the Board that his absence was due to other factors. Though that state of the record would have been sufficient, the Board noted additional evidence of Schapansky's strike participation (his "yes" vote on PATCO's strike, his presence on the picket line, and his admission that, simultaneously with his fellow union members who were withholding their services, he withheld his in what he called, after the fact, a "protest").

Schapansky's argument that the Board ignored the intent element involved in the striking charge is without merit. Before us, Schapansky says his only offense was absence and that he visited the picket line only out of curiosity. The argument ignores the circumstances which give meaning to his conduct. The Board specifically noted that an intent to strike can be proved by circumstantial evidence. Circumstantial evidence can be more persuasive and conclusive than direct evidence. *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325 (1960). The unrebutted *prima facie* case here constitutes such circumstantial evidence. An employee who did not intend to strike could, under the present circumstances, be expected to advise his employer of the true reasons for his absence at the earliest possible moment. If extraordinary circumstances (not here shown) prevented communication with his employer until the employee was mistakenly charged with strike participation, the employee could certainly be expected to explain his absence when (at the very latest) he responded to the agency's proposal to remove him. Schapansky's intent to withhold his services in concert with others is established on this record.

Schapansky is equally incorrect in asserting that proof of the charge requires proof of an employee's specific

intent to implement an agreed plan. Neither participation in strike planning nor express agreement with others to perpetrate the strike is a necessary ingredient of proof that a particular employee participated in a strike. If a requirement for proof of intent resides in 5 U.S.C. § 7311, (and we need not and do not decide that question here) proof of general intent suffices. Unexplained absence during a strike of general knowledge establishes that the employee "intended" to strike. The law, like life, recognizes that one may not eat his cake (strike for benefits) and have it too (escape removal when the strike fails by merely denying intent).

In *Moylan v. Department of Transportation,* No. 83-1150, also decided today, the *amicus curiae* argues that the Board's theory of proof announced in the present case denied the controllers due process because it retroactively subjected them to a more onerous burden of proof than the Board previously had applied. The amicus' argument is that the Board's prior standard required proof of active involvement in the strike, such as picketing, to establish a *prima facie* case of striking, and that in Schapansky's case the Board eliminated that additional element of proof.

The *amicus'* argument rests upon an erroneous assumption. There was no earlier rule requiring proof of active involvement in the strike to establish strike participation. Although earlier cases in which strike participation was found involved picketing and other active strike involvement, the Board never held that such activities were an essential element of the proof of strike participation. The Board's decision in the present case did not change the standard of proof necessary to show strike participation, but merely clarified it. Moreover, although the *amicus* in Moylan argues that the Board's allegedly new standard of proof denied the controllers a fair oppor-

tunity to present evidence under that standard, the *amicus* points to no specific evidence that the controllers would have introduced if they had known that the Board would evaluate their cases under that standard. All of the controllers had a due process opportunity before the Board to introduce evidence that they had not participated in the strike, and many took that opportunity.

The charges of absence without leave and violation of 5 U.S.C. § 7311 are supported by the same evidence found to support the charge of striking.

The Board found that the agency proved by a preponderance of the evidence the charges forming the basis for Schapansky's removal. Applying the statutory standard applicable to our review, we hold the Board's decision supported by substantial evidence and not to have been arbitrary, capricious or otherwise not in accordance with law.

(2) *The Penalty*

Sustaining the agency's determination that discharge was an appropriate penalty, the Board declined to rule on whether it had authority to mitigate it. In light of 5 U.S.C. § 7311, it held that dismissal "cannot be deemed clearly excessive or disproportionate to a sustained charge of striking".

Determination of the appropriate penalty is a matter committed primarily and largely to the discretion of the employing agency. *Jones v. United States*, 617 F.2d 233, 236 (Ct. Cl. 1980). Only in the exceptional case, in which the penalty exceeds that permitted by statute or regulations or is so harsh that it amounts to an abuse of discretion, may its imposition be overturned. *Weston v. U. S. Department of Housing and Urban Development*,

No. 83-859, slip op. at 11 (Fed. Cir. Dec. 30, 1983). Whether the court would have chosen a different penalty, had it been making the initial choice, is in the normal case irrelevant. "[P]enalty decisions are judgment calls that should be left to the discretion of the employing agency." *Weiss v. Postal Service,* 700 F.2d 754, 758 (1st Cir. 1983). The penalty here was clearly not disproportionate to the offense.

Striking against the government is a grave offense and a violation of the solemn oath an employee signs, as did Schapansky, as a condition of his employment. Striking, moreover, is a criminal offense. *See Jones, supra,* 617 F.2d at 237. It disrupts the functioning of the government itself. In this case, the inescapable and thus intentional goals of Schapansky and his striking cohorts, absent prompt governmental capitulation, were to inflict harm of the highest magnitude upon the national transportation system, to cause great public inconvenience, to injure the national economy, and to place at risk the public safety. *PATCO v. Federal Labor Relations Authority,* 685 F.2d 547, 622 (D.C. Cir., 1982) (Mackinnon, J., *concurring*). Removal under such circumstances was clearly justified, and the nexus between removal and efficiency of the service is clear.

It is argued that removal of many striking controllers actually injured the air traffic system, which was forced to rely on supervisors and new, rapidly trained controllers. The argument is inappropriate here. Whether the long range efficiency of the service is better served by capitulation, with its risk of encouraging future strikes, or by a temporary reduction in service while new controllers are trained, is solely a policy choice reserved to the executive branch.

Nothing of record supports Schapansky's assertions that the permanent removal penalty should have been mitigated and that mitigation considerations applicable to other types of charges must be applied here. Schapansky cites the length and quality of his past service. However, the gravity and effects of Schapansky's offense are so great, and the statutes relating to strikes against the United States are so unequivocal, that they do not merely limit the extent of appropriate mitigation; they render mitigation irrelevant. Congress has determined that removal is an appropriate penalty for striking against the government. It is therefore not necessary, as *amici* contend, to remand for a more complete record respecting mitigation factors. An individual with the longest and finest record may be removed when found to have irrevocably sullied that record by participating in the strike at bar against the United States. Long and excellent service creates no license to violate a criminal statute against striking, and to violate one's oath taken on the day of employment that one would not strike. Congress cannot be held to have acted unconstitutionally in enabling the United States to refrain from continuing to employ one who strikes against the federal government; nor can that enablement be impeded by mitigating factors that may be applicable to lesser offenses and different circumstances.

Lastly with respect to the penalty, Schapansky has not shown that his removal should be considered in light of the government's failure to remove those who returned to work during the Presidential grace period or "moratorium." Unevenness in application of a penalty is not a ground for invalidating it, *Jones v. U. S., supra,* 617 F.2d at 238, *Butz v. Glover Livestock Commission Co.,* 411 U.S. 182, 187, 188 (1973). Moreover, the argument re-

lating to returnees does not involve unevenness. Those who returned occupy a status entirely different from that of those who did not. Schapansky could have availed himself of the opportunity (as 1,200 air controllers did), but chose not to do so. The President having established a grace period, no reason exists for considering those who elected to accept the presidential invitation as though they were in the same category with those who disdained it.

Similarly, also, *amici's* reliance on the allegedly less harsh response of the government to earlier and different controller actions (a call-in-sick and a slowdown) which *amici* say the agency considered to have been strikes, is irrelevant. That other government workers have struck and been allowed to return to work, *see Miller v. Bond,* 641 F.2d 997 (D.C. Cir. 1981) and *Benson v. Don,* 520 F. Supp. 231 (W.D. Pa. 1981), or that a court may have viewed it permissible under some circumstances to continue government strikers in employment, *see U.S. v. Patco,* 653 F.2d 1134 (7th Cir.) *cert. denied,* 454 U.S. 1083 (1981), cannot be viewed as forever binding the government against the removal of any striker under any circumstances. Whether removal is mandatory under 5 U.S.C. § 7311 or 18 U.S.C. § 1918 need not be here decided. Removal is permissible under those statutes and no statute prohibits removal of any who strike against the United States. Beyond differing circumstances surrounding earlier events, nothing in the law requires that its enforcement with less than full vigor in the face of one violation of the law binds the government against full and fair enforcement in the face of a later and distinct violation of that law. Ideal justice, and government personnel regulations, envisage equal treatment of persons similarly situated. Whether those involved in earlier

events were similarly situated is not here determinable. What is clear is that mercy and compassion, if such were shown in response to earlier and differing infractions, should not be forged into handcuffs restricting the government's response to the present strike of air controllers in 1981.

Similarly, *amici's* strong assertion that the Board disregarded here its own approach to determination of the appropriateness of a penalty, *see Douglas v. Veterans Administration,* 5 MSPB 313 (1981) and *Woody v. General Services Administration,* MSPB Docket No. SF07528110028 (June 2, 1981) is unsupported in the record. That the penalty includes a barrier to reemployment as a controller is not unreasonable in view of the statute, 5 U.S.C. § 7311 ("may not accept or hold a position"), and does not require Schapansky's reinstatement as a controller.

We hold that the penalty here was not arbitrary, capricious, or otherwise not in accordance with law.

(3) *Procedures*

Schapansky says that because his unauthorized and unexplained absence during the strike did not constitute a "reasonable cause to believe" he had committed a crime, his discharge with less than thirty days notice was procedurally defective.

Section 7513(b) makes the normal 30 days' notice unnecessary when the agency has "reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed." As above indicated, 18 U.S.C. § 1918 makes participation in a strike against the government such a crime. Schapansky's unexplained absence during a well known strike established reasonable basis for the agency to believe that he was

engaged in such participation and thereby automatically established a reasonable basis for its belief that he had committed the crime of striking against the government. That a second charge, absence without leave, does not relate to a crime is irrelevant. An agency is not required to wait 30 days to respond to an employee's misconduct when that misconduct is reasonably believed to constitute a crime.

Though Schapansky complains of the lack of 30-day notice, he makes no attempt to demonstrate that the shortened time of notice was harmful. The Civil Service Reform Act specifies that only harmful procedural errors may vitiate an agency action. 5 U.S.C. § 7701(c)(2)(A) (Supp. II 1978). To be harmful the error must substantially impair the employee's rights. *Shaw v. Postal Service,* 697 F.2d 1078 (Fed. Cir. 1983); *Brewer v. United States Postal Service,* 647 F.2d 1093 (Ct. Cl. 1981), *cert. denied,* 454 U.S. 1144 (1982). Nothing of record would indicate that if the shortened time of notice were error (and as above indicated it was not), it impaired Schapansky's rights in any manner.

Schapansky argues that the President's August 3, 1981 announcement was a final decision to discharge him and that the agency's removal proposal did not afford him a meaningful opportunity to reply. *Amici* argue that Schapansky should have been given the right to reply to the President and to demand that the President state his reasons for his action. The argument is without merit.

The President's announcement said those who returned would retain, and those who continued to strike would forfeit, their positions. Some 1200 controllers returned. Having elected to continue on strike, Schapansky could hardly have been surprised when the promised

removal notice arrived. There was, contrary to Schapansky's argument, no discharge of Schapansky or of anyone else on August 3, 1981. After August 5, 1981, the agency carefully gave Schapansky all possible opportunities to reply under an entire panoply of rules, procedures, and regulations. Indeed, Schapansky filed three written responses and responded orally. Nothing whatever of record supports Schapansky's implication that he would not have been retained if he had shown a basis for his absence other than participation in the strike.

The President in no manner usurped the authority and responsibility of agency officials to determine whether each individual had continued to engage in the strike after the August 5, 1981 deadline. In view of the need to continue a safe air transportation system for the public, the President's dispensation was, as has been well described, a "grace" period that "worked" insofar as it enabled 1200 controllers to return promptly to maintenance of that system. One who commits a crime by striking against the government can be seen to have done so from the first moment he withholds his services in concert with others. Schapansky, along with all other striking air controllers, was in this case given a chance to rethink for two days and thereafter was given a full and complete due process opportunity to show that he had not in fact struck against the United States. The President bears a constitutional duty to "take care that the laws be faithfully executed," U.S. Const., Art. II, § 3, cl. 4. His action here was directly within his official responsibility, not merely within its "outer perimeter" as was found permissible in *Harlow v. Fitzgerald,* 457 U. S. 800 (1982). The President acted here in a manner obviously calculated to balance the public interest in a continuation of air transportation, immediate enforcement of the law,

and an opportunity for violators to reconsider. An argument that the President's grace period somehow denied due process comes with poor grace from one who ignored it.

Schapansky cites decisions in contempt actions against PATCO and individuals for noncompliance with court orders to return to work: *In re: Professional Air Traffic Controllers Organization, Air Transport Association of American v. Professional Air Traffic Controllers Organization,* 699 F.2d 539 (D.C. Cir. 1983); *PATCO v. Federal Labor Relations Authority,* 685 F.2d 547 (D.C. Cir. 1982); *United States v. Phillips,* 525 F. Supp. 1, 8 n.6 (N.D. Ill. 1981); *United States v. PATCO,* 525 F. Supp. 820, 822 (E.D. Mich. 1981); *United States v. Haggerty,* 528 F. Supp. 1286, 1296 (D. Colo. 1981) and language in opinions accompanying those decisions indicating that return to work was not possible after failure to meet the President's deadline. The citations are irrelevant here. That Schapansky lacked after his deadline a unilateral authority to simply return to work at will, and could not therefore be held in contempt of a return to work order, bears no relation to whether the procedures applied to his removal were proper. That those procedures were guided from agency headquarters, and spelled out that controllers would be removed *if* it were *proven* that they participated in the strike, speaks for, not against, an exercise of care for employee rights under difficult and unusual circumstances.

Amici assert that the agency's procedures giving Schapansky an opportunity to explain his absence were a "sham" because the agency was "forced" by the President's announcement to fire him. At the same time, *amici* complain that there was disparate treatment because some controllers, having apparently made adequate

explanations (described by *Amici* as "settlements"), were not discharged. *Amici* further say: the President's moratorium was an improper exercise of his power to pardon (U. S. Constitution, art. II, § 2 cl. 2); the agency had no power to extend the President's return to work deadline to the first scheduled shift following that deadline; and that the agency failed to notify Schapansky that he would not be removed if he met his next scheduled shift. All of those arguments have been fully considered and found without merit. Lastly, *amici's* assertions concerning the suffering of controllers' families invoke our sympathy; they cannot under the law invoke a reversal.

There is no basis whatever for Schapansky's claim that it was improper for the government to adopt a uniform policy of removing each employee whose participation in the illegal strike was proven, or that that policy denied Schapansky a full and meaningful opportunity to reply. Schapansky has not in the slightest demonstrated that any agency officials were unreceptive to evidence that the facts supporting the charge were not as alleged, and, as above indicated, mitigation is not an issue. The Court of Claims has rejected the argument that an agency's predetermination to remove an employee if the charges against him were proven is improper. *Pascal v. United States*, 543 F.2d 1284, 1289 (Ct. Cl. 1976). The court there noted that the "crucial point is that the plaintiff has failed to demonstrate that the [agency] would have been impervious if the proof failed to show that the facts were as charged." *Id.*

We hold that the agency's procedures were in accordance with law and that their application involved no harmful error.

DECISION

Accordingly, the Board's decision sustaining the August 26, 1981 permanent removal of Schapansky by the agency from his position as Air Traffic Control Specialist at the Air Route Traffic Control Center in Fort Worth, Texas, is affirmed.

AFFIRMED

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOCKET NUMBER
SL075281F0347

KIPP C. ANDERSON, *ET AL.*

v.

DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION

OPINION AND ORDER

I. *Background*

Appellants[1] have timely petitioned for review of December 2, 1982, initial decisions of a Board presiding official, sustaining their removals from positions as Federal Aviation Administration (agency or FAA) air traffic control specialists at the Olathe Air Route Traffic Control Center

1. The 35 individual appellants included in the above captioned consolidation who have submitted a consolidated petition for review are identified in Appendix I attached to this Opinion and Order. The appeal of John B. Weiss was included in this consolidation at the regional level where the agency's charges against Mr. Weiss were not sustained by the presiding official, and the agency has petitioned for review of the initial decision. A separate Opinion and Order will be issued with regard to Mr. Weiss. Accordingly, Mr. Weiss is not among the appellants subject to this Opinion and Order. The appeal of Michael W. Ingle (Docket No. SL075281F0428) was the subject of a separate initial decision issued on December 3, 1982. Mr. Ingle is included in the consolidated petition, however, and is subject to this Opinion and Order.

(ARTCC) in Olathe, Kansas.[2] Each of the appellants was charged with participating in a strike against the Federal Government and absence without leave (AWOL) because of failure to report for scheduled shifts after the beginning of the illegal nationwide strike called by the Professional Air Traffic Controller Organization (PATCO) on August 3, 1981.[3] Each of the appellants testified that he did not report for work on what the agency considered to be the "deadline shift"[4] and all except appellant Miller stipulated or testified that they made no attempt to contact the facility to obtain authorized leave for the dates on which they were charged with strike participation and AWOL.

The presiding official found that the agency met its burden of demonstrating that the strike continued through August 12, 1981, at the Olathe facility, and established a *prima facie* case of strike participation by each of these appellants by showing unauthorized absence from duty during the strike in accordance with the Board's holding in *Schapansky v. Department of Transportation, Federal Aviation Administration,* MSPB Docket No. DA075281F1130

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2. The agency submitted a timely Opposition to Appellant's Petition for Review on January 31, 1982. In addition to the consolidated petition for review, the Board has before it separate appellant and agency petitions for review of the initial decision as it pertains to Anthony M. Kolody (Docket No. SL075281F0446), and an agency response to Mr. Kolody's separate petition for review. Mr. Kolody's petition incorporates the consolidated petition by reference. Although the agency's petition appears to be untimely, and the agency has objected to the acceptance of Mr. Kolody's petition because it was filed prior to the filing of his change of designated representative, in the interest of a complete and accurate record, the Board is considering both petitions.

3. *See Ketchem v. Department of Transportation,* MSPB Docket No. DA075281F0713 (May 28, 1982).

4. As interpreted by this agency facility, the deadline shift was the first assigned shift after the "grace period" granted by President Reagan. Hearing Transcript (H. T.) at 128. The record shows that 21 of the appellants had "deadline shifts" of August 7th or later, the latest being August 11th for appellant Haynes.

at 6 n.2 (October 28, 1982). Finding that none of the appellants rebutted the agency's *prima facie* cases, the presiding official held that the agency proved the charges of strike participation and AWOL by a preponderance of the evidence. He then considered individual affirmative defenses raised by the appellants, as well as the general defense of harmful error in the agency reply process, and found none to have been proven. Further, he considered appellants' mitigation arguments but found mitigation to be inappropriate in light of the gravity of the offense and the Board's holding in *Schapansky, supra* at 11. Finally, the presiding official considered appellant Kolody's contention that he had been constructively suspended during the removal notice period without benefit of requisite adverse action procedures, and held that Mr. Kolody had been constructively suspended from August 8, 1981, when he attempted to return to work, to August 26, 1981, the effective date of his removal.[5]

II. *Petition for Review*

In alleging entitlement to review pursuant to 5 C.F.R. § 1201.115, the consolidated petition contends that there is new and material evidence which was not previously available,[6] and that the initial decisions were based on erroneous interpretation of various statutes and regulations. The consolidated petition for review is hereby GRANTED under 5 U.S.C. § 7701(e)(1).

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5. Although other appellants generally raised the constructive suspension issue in amended petitions for appeal and in the consolidated petition for review, none presented any evidence to show that he unequivocally notified the agency that he was ready, willing, and able to return to work. *Martel v. Department of Transportation*, MSPB Docket No. BN0752S1F0558 at 11 (April 25, 1983).

6. The alleged new evidence pertains to the appeals of John S. Sellers and Anthony M. Kolody and is discussed in connection with their individual cases *infra*.

We shall first address the general assertions of erroneous statutory and regulatory interpretation, and then consider specific arguments made on behalf of individual appellants.

III. *Proof of Strike Continuation*

The appellants first contend that the presiding official erred in determining that the agency met its burden of showing that the strike continued beyond 10 AM CST, August 5, 1981. In *Ketchem v. Department of Transportation,* MSPB Docket No. DA075281F0713 (May 28, 1982), the Board took official notice, subject to refutation, that an illegal strike commenced on August 3, 1981, and continued through at least August 6, 1981. Appellants base their allegation that the strike ended on August 5, 1981 on findings in *United States v. PATCO,* 524 F. Supp. 164 (D.D.C. 1981), and statements of then Secretary of Transportation Drew Lewis. These contentions were fully considered by the Board in rendering the *Ketchem* decision, and, in our view, do not refute the finding that a strike continued in progress at least through August 6, 1981.

As held by the Board in *Ketchem, supra,* where an employee is charged with strike participation on dates subsequent to August 6, 1981, the agency must prove by direct evidence that a strike was in progress on the date charged, and that the employee could have returned to work on that date. In the instant proceeding, the record reflects that only one appellant, Michael J. Haynes, was charged with strike participation commencing on a date subsequent to August 6th. Mr. Haynes was charged with strike participation commencing on August 11th. The agency produced unrebutted testimony that picketing was in progress at the Olathe facility until after August 12,

1981, and that any appellant with a deadline shift up to and including August 12, 1981, would have been permitted to return to work on that shift.[7] The Board can discern from the record on appeal no reason to disturb the presiding official's finding of strike continuation through August 12, 1981.[8]

IV. *Establishment of Prima Facie Case of Strike Participation*

Appellants have alleged that the presiding official erred in finding that the agency established *prima facie* cases of their participation in the strike. In *Schapansky v. Department of Transportation, supra,* at 6 n. 2 (October 28, 1982), the Board held that where the existence of a strike is a matter of common knowledge, the agency may establish a *prima facie* case of an employee's voluntary participation therein by presenting evidence of his unauthorized absence from duty during the strike. In the instant proceeding, the record shows that all appellants except Mr. Haynes were charged with striking during the period of which the Board has taken official notice that the strike was in existence[9] and there has been no attempt to refute such fact. It is also undisputed that none of these appellants appeared for duty on the date charged,

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7. H. T. at 128.

8. *See Noa v. Department of Transportation,* MSPB Docket No. NY075281F0697 (April 25, 1983).

9. Appellants contend that absence from duty during the period between August 3, 1981, and 10 AM CDT August 5, 1981, cannot be considered to be evidence of strike participation because those employees who return to work by their deadline shifts were not charged with strike participation. We disagree. The exercise of managerial discretion to refrain from disciplining those employees who in effect rehabilitated themselves by taking advantage of the "grace period" does not alter the fact that an illegal strike occurred beginning August 3, 1981.

nor with the exception of appellant Miller,[10] did they contend that they were on authorized leave on these dates. Accordingly, the presiding official properly found that the agency established *prima facie* cases of their strike participation.

With respect to Mr. Haynes, the agency has proven by direct evidence that the strike was in existence on August 11, 1981, the first date on which he was charged with strike participation. Further Mr. Haynes does not dispute the fact that he attempted neither to return to work nor to ascertain his status before or after August 11, 1981.[11] The Board in *Schapansky, supra,* at 6 n.2, permitted reliance on general knowledge that a strike was in existence as an element of the *prima facie* case; clearly proof of the strike's existence by direct evidence provides sufficient basis for that element of the *prima facie* case.

Thus, having proven that the strike was in existence on August 11, 1981, and having provided evidence that Mr. Haynes was absent without authorization on that date, the agency has established a *prima facie* case of Mr. Haynes' strike participation.

V. *Appellants' Rebuttal of the Agency's Prima Facie Case*

Appellants contend that the presiding official erred in finding that they did not rebut the agency's *prima facie* case. Their underlying argument is that each appel-

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10. Appellant Miller contends that he was on annual leave until August 6, 1981. He testified, however, that he received actual notice of the cancellation of such leave on August 2, 1981. H. T. at 941. Moreover, he was charged with strike participation through August 9, 1981, and as held *supra,* the agency has proven that the strike was in existence through August 12, 1981.

11. H.T. at 968, 973.

lant testified as to confusion regarding the deadline shift and each asserted that notwithstanding his not having reported for duty prior to 10 AM CDT, August 5, 1981, he would have reported at his later deadline had he been aware of it.[12] They thus argue that the confusion as to the deadline shift rebuts the *prima facie* case.

These appellants have been charged with strike participation and AWOL on specific dates on or prior to the date of the deadline shift. While failure to meet the deadline resulted in the filing of the charges, the charges are strike participation and AWOL. It is the Board's view that the grant of a "grace period" by the President had no effect whatever on the fact of either strike participation or AWOL. The "grace period" was merely an unrequired offer to allow strikers to rehabilitate themselves by returning to duty, that is, a form of conditional amnesty. Further, there is no dispute that the appellants had knowledge of the President's statement regarding the 48 hour grace period. That the "deadline shifts" for some appellants occurred after the expiration of the 48 hour period referred to by President Reagan can only be said to have worked to those appellants' benefit, not to their disadvantage. Moreover, these appellants not only failed to report at any time subsequent to commencement of the strike, but there is no evidence that any of them took any reasonable steps to ascertain their precise deadlines. Thus, neither proof of the deadline nor notification thereof can be regarded as an element of the strike charge, and a showing of confusion as to the exact time of the "deadline shift" does not rebut the agency's *prima facie* case.

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12. The facility chief, Rex McQueen, testified that all appellants would have been allowed to return to work at any time prior to the expiration of their deadline shifts. H.T. at 128.

Likewise, the allegation of several appellants that controllers with later deadlines received favorable treatment in comparison with those whose deadlines expired earlier and that such favorable treatment is a prohibited personnel practice in violation of 5 U.S.C. § 2302, is without merit. Not only have appellants failed to cite a specific prohibited personnel practice, but our review of 5 U.S.C. § 2302(b) reveals no provision to which their contentions are relevant.

VI. *Allegations of Harmful Procedural Error in the Adverse Action Reply Process*

In their petition for review, appellants continue to contend that public statements of President Reagan and high level agency officials, and alleged deficiencies in the notice of proposed removal and agency reply process, resulted in the denial of a meaningful opportunity for oral and written replies. They argue that such a denial constitutes harmful error and requires reversal of the agency action pursuant to 5 U.S.C. § 7701(c)(2)(A). Basically, appellants argue that the effect of the President's remarks[13] and instructions issued by agency headquarters to the individual agency facilities subjected the deciding officials to a "command influence" that rendered the oral reply opportunities meaningless and futile. In sum, the contention is that the deciding official lacked independent authority to make the final decision in each individual action.

After full review of the statements made by President Reagan and high level officials of the agency, the instruc-

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13. At approximately 11 AM EDT, August 3, 1981, President Reagan, after stating that an air traffic controller strike was in progress, announced that if air traffic controllers did not report for duty within 48 hours, they would "have forfeited their jobs and will be terminated." 17 Weekly Comp. Pres. Doc. 845 (1981).

tions sent to the facilities by agency headquarters, and most importantly the record evidence concerning the decision making process engaged in for the individual controllers at the facility level,[14] the Board finds that the agency's conduct of the reply and decision making process was in compliance with 5 U.S.C. §§ 7513(b) and 5 C.F.R. 752.404(c).

As stated by the agency in its amicus brief,[15] the "command influence" claim requires determination of the underlying questions of whether Executive Branch officials could establish a level of discipline for controllers participating in an illegal strike and whether any statement or instruction to FAA facilities deprived the deciding officials of the requisite authority to determine or recommend final action in the individual cases.

Our review of the statements made by President Reagan, then Secretary of Transportation Drew Lewis, and Federal Aviation Administrator Helms,[16] demonstrates that all such statements constituted specific information to the striking air traffic controllers regarding the penalty to be imposed for striking in the event that they chose not to avail themselves of the opportunity to return within the grace period. Thus, they were general statements of the penalty which would be imposed for those who were found

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14. Testimony of Rex McQueen, H. T. at 56-339.

15. *Amicus Brief on Executive Branch Remarks and Instructions for Office of Personnel Management, Department of Justice and Department of Transportation/Federal Aviation Administration, February 11, 1983.* By notice in the *Federal Register,* 48 Fed. Reg. 2235 (1983), the Board solicited *amicus* briefs on issues of law common to numerous removal appeals of former air traffic controllers. All such briefs received have been considered along with the parties' briefs in the Board's decision making process.

16. National Discovery Doc. Nos. (Doc. Nos.) 16c-4, 18-1, 18-2, 18-6, 18-7, 18-10, 18-11.

to have participated in the illegal strike against the Federal government. We can find no wording in these statements which in any way could be said to have suggested any determination as to whether any particular individual or group of individuals was either participating in the strike or AWOL or both.

It is well established that broad discretion is vested in management to establish appropriate discipline for employee misconduct subject to required statutory and regulatory procedures, providing that it is not arbitrary, capricious, or so unreasonable as to constitute an abuse of discretion. *Harris v. United States,* 640 F.2d 1309 (Ct. Cl. 1981). Among the limitations on the exercise of such discretionary authority is the requirement that employees be afforded prior knowledge of disciplinary guidelines. *Tucker v. Veterans Administration,* MSPB Docket No. PH07528110322 (April 14, 1982). In the instant case, the disciplinary guideline was not only publicly announced by the President of the United States and high level agency officials, but it is clearly set forth in the governing statute, 5 U.S.C. § 7311. Further, the statements setting forth the discipline to be imposed for those found to have participated in an illegal strike are in no way different from announced agency penalty tables or policy statements issued by agency officials indicating future disciplinary standards. None impinge on the deciding official's ability or authority to decide whether individual charges are sustained.

The law does not require that the deciding official operate without guidelines or standards, but only that he hear the employee's explanation, assess its credibility, and determine whether the charges should be sustained. *Pascal v. United States,* 543 F.2d 1264 (Ct. Cl. 1976). Accord-

ingly, we hold that there is no evidence that the public statements of President Reagan and high level agency officials either improperly affected the agency reply process or in any way adversely affected the appellants' rights.

We now turn to the determination of whether written instructions from agency headquarters to the facilities impinged on the deciding officials' requisite authority and thus invalidated the agency reply process. In this regard we have thoroughly reviewed the agency GENOTs[17] which included sample notice letters, instructions for their use, guidance regarding factors to consider in the oral replies, guidance for the processing of removal actions and the cancellation of proposed removal actions, and other details involved in the consideration of the personnel actions. The texts of these communications reflect the agency's intent to provide uniform procedural guidelines to the deciding officials and, indeed, to attempt to assure that all procedures were in accordance with statutory and regulatory requirements. Neither appellants' arguments regarding these headquarters communications, nor our word by word review of them, indicate any phraseology which could be interpreted as precluding the deciding official from reaching his own considered judgment on the merits of the charges in each case. It is that independence of judgment on the merits which is required by statute, regulation, and judicial precedent,[18] not the rendering of a decision without procedural and disciplinary guidelines.

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17. GENOT is the designation given to a "General Notice" which consists of a telegraphic message issued by FAA headquarters to all facilities. *See* GENOTs 129, 130, 141, 144, 147 and 149, Doc. Nos. 16a-5 through 16a-10.

18. *Pascal v. United States, supra*, at 1289; *Ricucci v. United States*, 425 F.2d 1252, 1254-1256 (Ct. Cl. 1970).

Of particular relevance were GENOTs 141 and 144. GENOT 141 did outline substantive factors for deciding officials to consider in reviewing individual cases but clearly anticipated that the deciding officials would determine that reinstatement was appropriate in some cases. Thus, after detailing some factors to be considered, GENOT 141 stated:

> No single factor is necessarily controlling. Deciding officials must weigh all factors, should particularly scrutinize the credibility of the information and above all apply sound managerial judgment.

That this judgment was anticipated to be exercised in favor of the reinstatement of those controllers who rebutted the charges against them is shown by GENOT 144 which specifically advised deciding officials of how to process those controllers who they determined should be returned to duty.

Moreover, that these communications were not regarded as empty gestures is shown by the fact that air traffic controllers were in fact reinstated as a result of their reply presentations. At the Olathe facility, the deciding official, Rex McQueen, testified that one air traffic controller was reinstated as a result of the presentation of medical documentation at the oral reply.[19]

In light of the foregoing analysis, the Board holds that neither the public statements of President Reagan and agency officials, nor the written communications from agency headquarters to the facilities, impinged on the ability of the deciding official to exercise independent judg-

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19. H. T. at 289-291. *See also Baracco v. Federal Aviation Administration*, MSPB Docket No. DC075281F0895 at 5 (April 25, 1983), where the deciding official withdrew twelve proposed removals.

ment regarding the sustaining of the charges in each case or in any other manner worked to deprive the appellants of a meaningful opportunity to reply to the charges.[20]

Appellants also contend that the agency committed harmful procedural error in invoking the "crime provision" of 5 U.S.C. 7513(b) in order to shorten the notice period. Since 18 U.S.C. 1918 provides that participation in a strike against the United States is a felony, punishable by up to one year of imprisonment, and since appellants were absent without authorization during the strike, we find that the agency had reasonable cause to believe that appellants committed a crime for which a sentence of imprisonment might be imposed. Therefore, the agency's invocation of 5 U.S.C. 7513(b)(1) was justified. *Schapansky, supra,* at 7-8.

VII. *Removal Penalty*

With respect to the propriety of the removal penalty, appellants contend that it is excessively harsh and should be mitigated. In *Schapansky, supra,* at 11, the Board reviewed potentially mitigating circumstances and found them to be insufficient to warrant reduction of the removal penalty. In that case, the Board found that under *Douglas v. Veterans Administration,* 5 MSPB 313 (1981), the agency's imposition of a removal penalty on an air traffic controller cannot be deemed clearly excessive or disproportionate to a sustained charge of striking against the Federal government, despite many years of government service or a flawless prior employment record. The nature and gravity of such an offense and its direct effect on the agency's ability to perform its mission far outweigh such

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20. That some appellants chose not to address the specific reasons for their proposed removals at the reply session was a matter within their control and choice and cannot now be alleged as faults in the afforded procedure.

otherwise mitigating factors. *Schapansky, supra,* at 10-11. Therefore, the Board will not disturb the removal penalty imposed by the agency in these appeals.

Thus appellants' consolidated petition for review does not demonstrate any error by the presiding official with regard to issues of general applicability. Accordingly, the initial decision is AFFIRMED with respect to its findings of fact and conclusions of law on such issues. The petition for review does however raise fact specific issues with respect to six appellants; these are discussed below.

Michael W. Ingle

The petition for review alleges that the presiding official erred in failing to find that Mr. Ingle was subjected to coercion and thus did not voluntarily participate in the illegal strike.

Mr. Ingle testified at the hearing that he had absented himself from duty on the dates charged because of fear of physical harm by fellow controller Fred Purvis. He stated that two or three weeks before the strike commenced, Mr. Purvis said that if he did not participate in the strike, "I'm going to throw your ass in the lake and drown you."[21] Appellant Ingle testified that he took this comment very seriously because Mr. Purvis was an ardent advocate of the strike and because Mr. Purvis knew that he did not know how to swim and once had almost drowned.[22] Appellant, however, also testified that the alleged threat was never repeated and that he did not report the threat to anyone until completing his response to agency interrogatories in May 1982.[23] Also, on cross-

21. H. T. at 23-24.

22. H. T. at 23-24.

23. H. T. at 23-24, 30-31.

examination at the hearing, appellant conceded that he did not take Mr. Purvis' threat literally but rather feared some sort of violence against his family.[24]

The Board, in *Johnson v. Department of Transportation*, MSPB Docket No. DC075281F0998 (November 10, 1982), held that

> the appropriate standard for establishing a defense of coercion or duress requires the employee to demonstrate, by a preponderance of the evidence, that his failure to report for work was a result of a threat or other intimidating conduct, directed toward him, sufficient to instill in him, a reasonable fear of physical danger to himself or others, which a person of ordinary firmness would not be expected to resist. (Footnotes omitted.)

Applying the *Johnson* standard to the evidence presented by Mr. Ingle, the Board agrees with the presiding official that appellant did not establish his defense of coercion.

The nature of the alleged threat, combined with its timing and lack of repetition in the weeks immediately preceding the strike, simply do not create the sense of immediacy or seriousness required to instill a reasonable fear of physical danger which a person of ordinary firmness would not be expected to resist. Further, both appellant's concession on cross-examination that he did not necessarily take the alleged threat literally and his failure to report the alleged incident at any time prior to May 1982[25] greatly diminish the credibility of appellant's as-

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24. H. T. at 33-34.

25. The petition for review alleges that the presiding official's credibility determinations were based on the drawing of an adverse inference from appellant's union representation at the agency

(Continued on following page)

sertions of fear and coercion. Thus, we find appellant Ingle's contention of error in this regard to be without merit.

Lester E. Cooke, Jr.

Appellant Cooke alleges that he was denied the opportunity to present an oral reply and that such denial constituted harmful error. The record indicates that there apparently was some confusion in Mr. Cooke's mind as to the scheduling of his oral reply, and that as a result he did not appear at the facility in time to be present at the reply proceeding.[26] The agency had scheduled Mr. Cooke's reply for 9:00 A.M. on August 18, 1981,[27] but Mr. Cooke did not appear at the facility until approximately 9:10 A.M. because of his understanding that the reply was scheduled for 9:15 A.M. Mr. Cooke was informed that his designated representative had appeared at 9:00 A.M., had represented him at the oral reply, and that the oral reply session had concluded.

Mr. Cooke testified that he requested another opportunity to reply but that it was refused.[28] He stated that if he had been present at the reply he would have raised the defenses which were eventually asserted at the hearing,

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Footnote continued—

oral reply presentation. Neither the record nor the initial decision support such an assertion. Moreover, to the extent that the appellant's failure to present information at his oral reply was the result of his representative's determination, appellant is responsible for the action or inaction of such representative. *Nathaniel v. U. S. Postal Service*, MSPB Docket No. CH07528110283 (February 19, 1982); *Scheer v. Department of the Navy*, SF07528110132 (February 1, 1982).

26. H. T. at 665-666, 674-677.

27. Cooke's Skeleton File, Tab 4(7).

28. H. T. at 665-666.

namely, confusion as to his deadline shift, fear of returning to work because he had seen a televised report of a South Carolina controller being taken away in shackles by law enforcement officers, and fear for the safety of the flying public during the strike.[29]

The record evidences that there was an oral reply opportunity and that Mr. Cooke's designated representative appeared on his behalf at the reply session. Moreover, appellant Cooke submitted a written reply in which he made no assertions in defense of his action.[30] Thus, even if we were to find that error occurred, the record does not contain evidence sufficient to prove the requisite harm.[31] That is, taken in its best light, the appellant's testimony of what he would have stated at the oral reply does not create an inference that his participation in the oral reply session would likely have affected the agency's decision.[32]

Thomas G. Downs

The consolidated petition for review alleges that Mr. Downs requested an oral reply opportunity, that it was improperly denied on the basis of timeliness, and that such denial constituted harmful error requiring reversal pursuant to 5 U.S.C. § 7701(c)(2)(A).

The notice of proposed removal, which advised appellant that if he desired an oral reply he must request it within seven days from receipt of the notice, was sent

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29. H. T. at 667-670.

30. Cooke's Skeleton File, Tab 4(3).

31. See *Baracco v. Department of Transportation*, MSPB Docket No. DC075281F0895 (April 25, 1983).

32. *Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980).

to the most recent address provided to the agency by the appellant. It was received by appellant's mother on August 10, 1981.[33] Appellant testified, however, that he did not personally receive the letter until August 14, 1981, and therefore believed that he had until August 21, 1981, to request an oral reply.[34] An oral reply request was received by the agency on August 20, 1981, but was found to be untimely and therefore was denied.[35]

The presiding official held that the notice of proposed removal was constructively received by Mr. Downs on August 10, 1981, and that his request for an oral reply was therefore untimely. Further, he held that even if the agency erred in its denial of the oral reply opportunity, such error was harmless. The Board fully agrees. Since the agency properly sent the notice of proposed removal to the mailing address furnished by appellant, we find that the notice was constructively received by appellant upon delivery to such address. Moreover, in response to the presiding official's question as to what appellant Downs would have stated at the oral reply if he had had one, Mr. Downs stated "I don't have the slightest idea."[36] Thus, if error occurred, the appellant has furnished no evidence that "it was within the range of appreciable probability that error had a harmful effect upon the outcome before the agency."[37] Accordingly, appellant did not sustain his burden of proof of the affirmative defense of harmful error by a preponderance of the evidence.

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33. H. T. at 88-89, 687-688, 690, 700.

34. H. T. at 689, 697-700.

35. Thomas G. Downs' Skeleton File, Tab 4(3).

36. H. T. at 708.

37. *Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980).

Robert B. Chamberlain, Jr.

Appellant Chamberlain contends that the presiding official erred in finding that he did not rebut the agency's *prima facie* case of strike participation. Mr. Chamberlain asserts that his absence from duty on the dates charged was the result of illness which incapacitated him from air traffic controller duties. The record contains testimony[38] and medical documentation[39] that are generally supportive of a finding that he was bothered from time to time over a 3 year period by an allergy which sometimes required disqualifying medication. With respect to the charged dates, however, the only evidence of illness is Mr. Chamberlain's testimony that he suffered an allergic flareup in early July which continued through August. Appellant testified that following his shift on August 1, 1981, he commenced taking disqualifying medication and continued to take it during that week and into the following week.[40] Mr. Chamberlain concedes, however, that he did not notify the agency of his illness on the dates charged until he submitted his response to interrogatories in May of 1982. He alleges that his supervisor told him and other employees that they need not call in for sick leave because it would be denied automatically.[41] His supervisor, William Hambelton, however, testified that although he informed his employees that it was likely that sick leave would be denied, he did not advise them to refrain from requesting it in the event of illness.[42] Moreover, the appellant and his supervisor testified that while the med-

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38. H. T. at 416-442, 1091-1095.

39. Appellants' Exhibit 30.

40. H. T. at 423, 440.

41. H. T. at 424-425, 431-432, 438, 441.

42. H. T. at 1093.

ication was incapacitating for air traffic control duties, it was not so for administrative duties, and in the past appellant had performed administrative duties while on the medication.[43] The only explanation offered for Mr. Chamberlain's failure to report his illness and to appear for administrative duties was that he feared that the agency would think that he was intentionally disqualifying himself for air traffic control duties.[44] The Board finds this explanation to be lacking in credibility. We cannot accept an assertion that reporting illness and either requesting sick leave, or appearing for administrative duty, would be more likely to be interpreted as strike support than would appellant's complete failure to report.

Thus, the Board agrees with the presiding official's finding that Mr. Chamberlain's allegations of illness are lacking in credibility. Accordingly, we hold that Mr. Chamberlain's assertions of error are without merit.

John S. Sellers

Appellant Sellers contends that the presiding official erred in rejecting his assertion that, prior to his actual deadline, he was informed by assistant chief Joe West that he had been fired, and that as a result of that conversation, and his lack of awareness of his own deadline shift, he believed that it was futile to attempt to return to work. Appellant expresses his disagreement with the presiding official's credibility findings and seeks to introduce new evidence in the form of affidavits to support his assertions.

The Board affords due deference to the credibility determinations of its presiding officials who hear and ob-

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43. H. T. at 430, 432.

44. H. T. at 442.

serve the demeanor of the witnesses, and will only undertake the burden of a complete review of such determinations if the petition for review specifies evidence or reasons which enable the Board to ascertain whether there is a serious evidentiary question.[45] The appellant's mere expression of disagreement with the presiding official's credibility determinations does not merit review. Likewise, the alleged new evidence proffered with the petition for review does not raise serious evidentiary questions particularly in light of the fact that appellant did not mention the alleged conversation with supervisor West at any time prior to the board hearing, despite numerous opportunities to do so.[46] Indeed, in response to agency interrogatory number 18 regarding circumstances alleged to have made his absence involuntary, and the specific names of those involved in such circumstances, appellant stated that based on the statements of the President and Secretary of Transportation he believed that he had been terminated on August 5, 1981 at 10:00 A.M.[47] There was absolutely no reference to Mr. West. Accordingly, we find no reason to disturb the presiding official's credibility findings or ultimate determination with respect to Mr. Sellers' appeal.

Anthony Kolody

The presiding official affirmed the removal of Mr. Kolody, but held that he had been constructively suspended from August 8, 1981, through August 26, 1981. Appellant Kolody has petitioned for review of the initial decision with respect to the removal and the agency has petitioned for review with respect to the finding of constructive suspension.

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45. *Weaver v. Department of the Navy*, 2 MSPB 297 (1980).

46. Sellers' Skeleton File, Tab 1, 4 and 7.

47. *Id.*, Tab 7 at 4.

The appellant's petition for review merely contests the presiding official's credibility determinations and proffers new evidence in support of Mr. Kolody's assertions.[48] There is no showing whatever that the new evidence was previously unavailable despite due diligence, as is required by 5 C.F.R. § 1201.115(a), and it thus cannot be considered. Appellant's contentions with regard to the credibility determinations upon which the presiding official based his holding are likewise insufficient to establish error on the part of the presiding official.

With regard to appellant Kolody's suspension claim, the Board held in *Martel v. Department of Transportation,* MSPB Docket No. BN075281F0558 at 11 (April 25, 1983), that in order to meet an appellant's burden of establishing jurisdiction over an alleged suspension during the notice period under 5 C.F.R. §1201.56(a)(2), an appellant must show that the action was involuntary and disciplinary in nature, and that he was ready, willing and able to work during the period of time in question. The latter showing cannot be met without proof that the appellant unequivocally notified the agency that he was ready, willing and able to return to work.

It is undisputed that on August 8, 1981, two days prior to his receipt of the notice of proposed removal,[49] Mr. Kolody requested the assistance of a facility training instructor, Ed Boeger, to facilitate his return to work. Further, it is also undisputed that Mr. Boeger arranged an informal meeting at the facility later that day with

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48. The individual petition for review filed by Mr. Kolody also requests remand for the hearing of additional witnesses. There is no showing that such witnesses were unavailable at the time of the hearing, and indeed, one such witness, Ed Boeger, testified at the hearing.

49. Kolody's Skeleton File, Tab 4(2).

Rex McQueen, facility chief, at which time Mr. Kolody informed Mr. McQueen that he wanted to return to work. Mr. McQueen did not permit Mr. Kolody to return to work but rather advised him that the procedures set forth in the notice of proposed removal would have to be followed.[50]

Accordingly, the Board finds that Mr. Kolody was ready, willing and able to work on August 8, 1981, and that pursuant to our holding in *Martel, supra,* he was constructively suspended from August 8, 1981, through August 26, 1981. We concur with the finding of the presiding official in this regard.

Conclusion

The initial decisions of the presiding official are hereby AFFIRMED and the appellants' removals are SUSTAINED, with the exception of those portions pertaining to appellant Weiss, in view of the fact that the agency has filed a separate petition for review with respect to his appeal. The Board hereby ORDERS the agency to cancel its constructive suspension of appellant Kolody from August 8 through August 26, 1981.

Proof of compliance with this Order shall be submitted by the agency to the Office of the Secretary of the Board within twenty (20) days of the date of the issuance of this Opinion. Any petition for enforcement of this order shall be made to the St. Louis Regional Office in accordance with 5 C.F.R. § 1201.181(a).

This is the final order of the Merit Systems Protection Board in these appeals.

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50. H. T. at 979, 983-985, 1027-1030, 1109-1110.

Appellants are hereby notified of the right to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be filed no later than thirty (30) days after appellants' receipt of this order.

April 25, 1983
(Date)

/s/ Herbert E. Ellingwood
Herbert E. Ellingwood
Chairman

April 25, 1983
(Date)

/s/ Ersa H. Poston
Ersa H. Poston
Vice Chair

April 25, 1983
(Date)

/s/ Dennis M. Devaney
Dennis M. Devanev
Member

Washington, D.C.

APPENDIX C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ST. LOUIS REGIONAL OFFICE

CASE NUMBER SL075281F0347
DECIDED ON DECEMBER 2, 1982

KIPP C. ANDERSON, et al.[1]
Appellants

v.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
Agency

INTRODUCTION

By petitions timely filed, the appellants seek to appeal the actions of the agency which separated them from their positions of Air Traffic Control Specialists (Center), at the Olathe Air Route Traffic Control Center (ARTCC), Olathe, Kansas.

JURISDICTION

A federal employee may appeal any action to the U.S. Merit Systems Protection Board (the Board) which is appealable under law, rule, or regulation. 5 U.S.C.A. 7701(a) (1980). An employee in the competitive service

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1. The 36 individual appellants included in the above-captioned consolidation are identified in the Appendix attached to this decision.

who is not serving a probationary or trial period is entitled to appeal a removal action to the Board. 5 U.S.C.A. Chapter 75 (1980). At the time of their removals, the appellants occupied positions in the competitive service and were not serving probationary periods. Accordingly, they have a statutory right to appeal their separations to the Board. 5 U.S.C.A. 7511-7513 (1980).

ANALYSIS AND FINDINGS

Pursuant to 5 U.S.C.A. 7701(c)(1)(B) (1980), an agency's decision to remove an employee from his position with the Federal Government because of misconduct may be sustained only if it is supported by a preponderance of the evidence. The Board defines preponderance of the evidence as "(t)hat degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true." 5 C.F.R. 1201.56(c)(2) (1982).

The agency charged each of the 36 appellants in this consolidation with participating in a strike against the Federal Government[2] and unauthorized absence when they failed to report for their scheduled shifts after the beginning of the nationwide strike called by the Professional Air Traffic Controllers Organization (PATCO) on August 3, 1981, at approximately 7:00 a.m. Central Daylight Time (CDT). *See* Appellants' Skeleton Files, Tab 4(2).

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2. In *United Federation of Postal Clerks v. Blount*, 325 F. Supp. 879, 884 (D.D.C.), *aff'd*, 404 U.S. 802 (1971), the court defined the term "strike" as found in federal statutes as "any strike or other concerted stoppage of work by employees . . . and any concerted slowdown or other concerted interruption of operations by employees." It further held that "(t)he Government . . . interprets 'participate' to mean 'striking,' the essence of which is an actual refusal in concert with others to provide services to one's employer."

In *Schapansky v. Department of Transportation, Federal Aviation Administration,* MSPB Docket No. DA075281F1130 (October 28, 1982), the Board held that an agency may establish a *prima facie* case of an employee's voluntary participation in a strike by presenting evidence of his unauthorized absence from duty during the strike. The burden of persuasion then shifts to the employee to rebut the agency's case by presenting evidence to show that he had no knowledge of the existence of the strike or to demonstrate that his absence was due to some factor other than intentional participation in the strike. The agency, of course, must ultimately establish appellant's participation by a preponderance of the evidence pursuant to 5 U.S.C. 7701(c)(1)(B).

The parties to the consolidated appeal stipulated to the following facts:

(1) A strike was called by PATCO beginning at 7:00 a.m. CDT on August 3, 1981.

With the exception of appellants Chamberlain, Voegele, Miller, and Weiss, none of the appellants requested or was granted leave for his absence and none notified his supervisor that he would not appear for work.

(3) With the exception of appellants Anderson, Blume, Paula Downs, Kaullen, Philbrick, Olsen, Sellers, Voegele, Weiss, Ebeling, Cooke, Flynn, Harms, and Potty, each of the appellants acknowledged, prior to the strike, that he was aware that engaging in a strike was an illegal activity. Master File, Tab 38.

In addition, other than appellant Weiss, each appellant testified at the hearing that he did not report for work on what the agency considered to be his first assigned shift after the grace period granted by President Reagan.

I note that while appellants Miller and Haynes have raised annual leave defenses, the agency did not propose the removal of either individual until he missed a deadline shift scheduled after the expiration of his annual leave. Finally, each appellant testified that he did not attempt to contact his supervisor or anyone at the facility to obtain excused leave for the periods he was charged with participating in the strike and being AWOL.

In *Ketchem v. Department of Transportation,* MSPB Docket No. DA075281F0713 at 9 (May 28, 1982), the Board held that an unlawful strike of air traffic controllers began on August 3 and continued at least through August 6, 1981. This timeframe encompasses the beginning of the duty shifts for which several of the appellants in this consolidation were first charged with participating in the strike and being AWOL. The Board also held in *Ketchem, id.,* at 9, that where appellants are charged with participating in the strike subsequent to August 6, 1981, the agency bears the burden of proving by submission of direct evidence that a strike was in fact in progress on the date charged, and that the employee could have returned to work on that date.

The record reveals that 21 of the 36 appellants in this consolidation had first assigned shifts of August 7, 1981, or later. The latest first assigned shift after the President's moratorium for any of the appellants in this consolidation was August 12, 1981, and concerned appellant Haynes. It is undisputed that each of the appellants with a first assigned shift between August 6 and 12, 1981, could have returned to work on that shift. Tr. 128. Further, the facility chief, Rex W. McQueen, testified that none of the appellants whose first assigned shift was after August 6, 1981, ever attempted to return to work prior to the conclusion of that shift. He also testified that picketing at

the Olathe facility began on the morning of August 3, 1981, and lasted until the end of October, 1981. Tr. 77-81, 132. The evidence adduced by the agency that the strike continued through August, 1981, was totally unrefuted by the appellants. In oral argument, appellants' counsel challenged the Board's decision in *Ketchem* and attempted to demonstrate that the strike actually ended on August 6, 1981, through presentation of court decisions and administrative proclamations to that effect. However, in light of the direct evidence presented by the agency, I find that it has met its burden under *Ketchem* of demonstrating that the strike continued at least through August 12, 1981, at the Olathe facility.

I further find that the agency has met its burden under *Schapansky* of establishing a *prima facie* case of participation in the strike by each of the 36 appellants in this consolidation. Concerning 35 of the 36 appellants, there is no factual dispute as to the latest date each was charged with being on strike and AWOL. Appellant Haynes was not charged with being on strike and AWOL until, by his own admission, after his scheduled annual leave ended. Tr. 967-969. With respect to appellant Miller, even assuming arguendo that his leave was not cancelled and did not end until August 6, his removal was nevertheless not proposed until August 9, 1981, when he missed the deadline established on that date. Appellant Miller's Skeleton File, Tab 4(2). Thus, even though the agency's charges against appellant Miller of striking and being AWOL include dates on which he was actually on leave, his annual leave defense, by his own testimony, would cover only his absence through August 6, 1981. Tr. 939-943, 954-956. In both of these cases, the appellants were provided an opportunity to report for work on deadline shifts after their periods of annual leave expired. Neither

appellant reported to work. Thus, including appellants Haynes and Miller, 35 of the 36 appellants admitted that they did not report to work on what the agency considered to be their first assigned shifts after the grace period granted by the President, and did not attempt to obtain excused leave for their absences.

Appellant John B. Weiss, Jr., testified that he had been previously granted and was on annual leave through August 10, 1981. He further testified that he was never notified that his leave was cancelled. Finally, he testified that the watch schedule included in the evidence file relied upon by the agency and which indicates that his annual leave actually ended on August 6, 1981, was incorrect. Appellant Weiss's Skeleton File, Tab 3(7). Tr. 898-935, generally. Appellant Weiss produced no corroborating evidence in support of his testimony that he, had in fact, been granted and was on uncancelled annual leave through August 10, 1981.

The evidence relied upon by the agency includes a watch schedule which shows appellant Weiss on annual leave for August 2 and 3, 1981, on regular days off on August 4 and 5, and assigned to a work shift on August 6, 1981, and thereafter. Appellant Weiss's Skeleton File, Tab 3(7). Also included at Tab 3(7) of the Weiss Skeleton File is a document entitled Leave Information, signed by appellant Weiss and by his supervisor, Michael J. Brown, on June 16, 1981, which indicates that leave was originally approved for the former through August 10, 1981. This document has been annotated by an unknown author to coincide with the watch schedule described above. The agency produced no witness to testify concerning the claimed cancellation of appellant Weiss's leave through August 10, 1982, nor did it submit any notices which might have been given to appellant Weiss of such cancellation.

It did offer an affidavit from supervisor Brown which indicates only that annual leave for appellant Weiss was approved through August 3, 1981, and that that approved leave was reflected on the watch schedule compiled by Brown on July 11, 1981, and given to appellant Weiss on July 12, 1981. The affidavit indicates also that appellant Weiss never contacted Brown raising any questions about or objections to the watch schedule given to him. I note that the affidavit makes no mention whatsoever of the cancellation of the annual leave from August 6 through 10, 1981, which had been previously granted to appellant Weiss and which is identified on the document entitled Leave Information in the evidence file supplied by the agency. Agency Exhibit H.

Accordingly, the relative weight of the evidence adduced by both parties must be analyzed. Appellant Weiss testified unequivocally that he was never notified that his annual leave for the period through August 10, 1981, was cancelled. The agency offered a watch schedule which shows annual leave approved only through August 3, and an affidavit from a supervisor to that effect. However, the agency also included in the evidence file a document which indicates that, at one point, leave was approved for appellant Weiss through August 10, 1981. At no time did it present any evidence which would support a finding that appellant Weiss was ever notified that the leave originally approved by supervisor Brown on June 16, 1981, was cancelled. I therefore find that appellant Weiss has successfully rebutted the agency's *prima facie* showing that he participated in the strike and was AWOL. /

All of the appellants testified that they believed that they had been "fired" by President Reagan as of 11:00 a.m. EDT, August 5, 1981. Each appellant testified that he was unaware of his individual deadline until later and

that, had he but known that deadline, he would have met it. However, such reasoning by the appellants is clearly specious. It is undisputed that while each appellant may not have been aware of his exact deadline after the moratorium period, each appellant was well aware of the assigned shifts he was to work during the week of August 2-8 and succeeding weeks. In addition, none of the appellants ever contacted his supervisor or anyone at the agency in order to determine what his individual deadline was. A more reasonable course of action would have been for the appellants to have initiated such contacts. Finally, the President's speech specified only that those who did not return within 48 hours "will be terminated." He did not identify when those who failed to return to work would be terminated. I therefore find no merit to the appellants' assertion that they believed that they were fired a 11:00 a.m. EDT on August 5, 1981, and further find that they have not rebutted the agency's *prima facie* cases against them.

Appellants Anderson, Zongker, and Blume contend that they were confused as to their individnal deadline dates by the fact that a fellow controller, Thomas Brigdon (Anderson's brother-in-law), who they believed was assigned to their shift, attempted to report to work but was informed that he had missed his deadline and that it was too late. This defense to the charges is a variation of the confusion defense analyzed above, and I find it equally unpersuasive. The fact is that none of these appellants attempted to discover his deadline or to return to work. Similarly, the argument by appellant Haynes that he was confused by what controller Robert Porter, whom it is claimed also made a futile attempt to return to work, told him about his deadline shift is also unpersuasive. Finally, the contention by several of the appellants that

they were confused by the new deadline dates set forth two controllers who telephoned the facility by their individual deadlines is found wanting. If any appellant had in fact been confused by the misinformation described above, he could have easily ascertained his individual deadline by simply telephoning or inquiring at the facility.

A number of the appellants also contend that the charges against them should be excused by the fact that they sincerely believed that the skies were unsafe for the travelling public at the time of the strike, and they could not conscientiously report for work. Inasmuch as the appellants undoubtedly contributed to and exacerbated the conditions described by them, I do not find their argument to be persuasive. A variation on this theme is the contention by many of the appellants here that they were not apprised of the agency's contingency plan in the event of a strike. However, both arguments are plainly specious, and I do not find that they justify appellants' failure to report for work.

Appellant Robert P. Chamberlain, Jr., testified that he was ill at the time of the strike and was taking medication for an allergic condition. Tr. 416-442, generally. He testified that he did not inform his supervisor of his physical condition since he was aware that agency policy during the period of the strike was that sick leave would not be granted. Tr. 424-425, 431-432, 438, 441.

Thus, appellant Chamberlain's defense to the charges against him is that he was ill. On their face, his testimony and the medical documents submitted at the hearing (Appellants' Exhibit 30) support a finding that during the strike period his allergies were bothersome and indeed that he may have been incapacitated from working at his regular duties. However, appellant Chamberlain failed

to notify anyone at the agency of his claimed medical condition nor did he request leave of the agency as required. Despite several explicit opportunities during the reply process and in his petition for appeal, appellant Chamberlain did not allege that he was ill at the time of the strike until he filed his answers to the interrogatories in the spring of 1982. Appellant Chamberlain's Skeleton File, Tabs 1, 4, and 7. Accordingly, I find that appellant Chamberlain's allegation is lacking credibility and untimely raised. Even assuming arguendo that he was ill and incapacitated, there is no evidence that he ever attempted to contact the agency in an attempt, however futile, to have his absence excused. I therefore find that he has not rebutted the agency's *prima facie* showing that he participated in the strike and was AWOL.

Appellant John S. Sellers testified that supervisor Joe P. West informed him in a conversation on the picket line on August 5, 1981, and thus prior to his deadline, that he had already been terminated. Tr. 628-630, 647-653. Appellant Sellers' contention is that since he was informed by supervisor West that he was fired, and since he was not individually aware of his own deadline date, he believed that it would be futile for him to attempt to return to work. Supervisor West testified that he indeed talked to appellant Sellers and several other controllers on August 5, 1981, and told them that if they did not come to work, they would be fired. He specifically denied telling appellant Sellers that he had already been terminated. Tr. 1080-1083, 1087-1089.

Supervisor West's testimony is found to be credible since it accords with the agency policy, as adapted at the Olathe facility, of allowing controllers to return to work by the conclu on of their first assigned shifts after the grace period. Thus, it would have been illogical for

West to have said otherwise. Further, appellant Sellers did not mention the conversation with supervisor West during the reply process and in his petition for appeal. He did not, moreover, raise the matter in his answers to interrogatories filed on May 29, 1982. Appellant Sellers' Skeleton File, Tabs 1, 4, and 7. In fact, he did not raise the issue until the hearing. I therefore find that appellant Sellers' testimony is lacking in credibility and that he has not rebutted the agency's *prima facie* case against him.

Appellant Bertels testified that he believed that, as a trainee or developmental controller, he might be "affected" if he did not participate in the strike and the striking controllers returned to work. He did not elaborate as to how he could be "affected." Tr. 458. I find that appellant Bertels has presented insufficient evidence to rebut the agency's *prima facie* showing that he participated in the strike and was AWOL. As the Board held in *Johnson v. Department of Transportation,* MSPB Docket No. DC075281F0998 at 8-9 (November 10, 1982), "jeopardy of career advancement . . . may not suffice to render involuntary" participation in the strike.

Finally, appellant Anthony M. Kolody testified that the agency reneged on a promise to him that, after divulging names of controllers in Denver who had threatened him, he would be returned to work with only a 10-day suspension. Tr. 979-1002, generally. Facility Chief McQueen testified that he did tell appellant Kolody at an informal meeting prior to the oral reply that he had a reasonably good case and that he should fully address the matter during the reply process. He testified, however, that he had never promised appellant Kolody that he would receive only a 10-day suspension and in fact did not tell him that he would be returned to work.

He testified that during the reply process, appellant Kolody failed to come forward with evidence that would have warranted restoring him to duty. Tr. 1109-1110, 1127.[3]

Appellant Kolody's testimony here relating to facility chief McQueen's promise is at variance with the agency's processing of the adverse action against him. He admitted that he was told by McQueen that he would have to formally reply to the charges against him. Such a requirement would have been illogical if McQueen had actually made the alleged promise. It is undisputed that McQueen, at any time, could have summarily cancelled appellant's removal and would not have had to await the results of the reply process to do so. In sum, I find his testimony more credible than that of appellant Kolody. I therefore find that appellant Kolody has not rebutted the agency's *prima facie* showing.

In sum, in reviewing the evidence presented by all parties, I find that the evidence adduced by the agency clearly preponderates except as to appellant Weiss. All of the appellants here, with the exception of appellant Weiss, failed to report for work as scheduled and/or were absent without permission for their first assigned shifts after the grace period granted by President Reagan. The several individual and miscellaneous defenses to the charges have been analyzed and found wanting. I therefore conclude that the agency has demonstrated by the preponderance of the evidence that all the appellants in this consolidation, with the exception of appellant Weiss, participated in the strike, and, at the same time, were absent without authorization from work.

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3. Appellant Kolody did not formally contend during the appellate process that his absence from work was occasioned by such threats as he allegedly received.

Although an agency's charges may be supported by a preponderance of the evidence, its action may not be sustained if the appellant can show (1) that there was harmful error in the application of the agency's procedures in arriving at its decision; (2) that the decision was based on a prohibited personnel practice under 5 U.S.C. 2302(b); or (3) that the decision was not in accordance with law. 5 U.S.C.A. 7701(c)(2) (1980).

The appellants contend that the agency committed harmful procedural error in the adverse action reply process. They argue that the oral reply procedures conducted by the agency were futile rituals, implying that they did not actually have an opportunity to succeed with their oral responses. It is the appellants' contention that the agency's mostly negative responses to the questions propounded by their representatives did not constitute the "give and take" required in an adverse action reply proceeding as set forth in *Ricucci v. United States*, 425 F. 2d 1252 (Ct. Cl. 1970).

The evidence shows, however, that all of the appellants here were clearly given a full opportunity to present their oral replies. The evidence also shows that a number of the appellants elected to bring a union representative to their oral replies and to allow that representative to act on their behalf. A review of the appellants' Skeleton files reveals that the union representatives presented virtually identical oral replies for many of these appellants. The oft-repeated pattern was for the union to ask a series of questions which did not necessarily address the relevant issues in the appellants' cases.

However, even if some of the appellants in this consolidation were thus deprived of an oral reply because they did not present explanations for their absences during

the strike, such loss was directly caused by the manner in which their designated representatives chose to present the replies on their behalf. Appellants are responsible for the actions or inactions of their representatives. *Nathaniel v. U.S. Postal Service,* MSPB Docket No. CH07528110283 (February 19, 1982); *Scheer v. Department of the Navy,* SF07528110132 (February 1, 1982). Each appellant was clearly provided the opportunity to make an oral and a written reply and in so doing address the reasons for his proposed removal. Similarly, each appellant was free to sever his connection with his union representative and to present his own oral reply if he believed that he was not adequately represented. At least one of the appellants did so, bringing a private attorney with him to his oral reply.

The Board has held that although it is very important that there be "give and take" in an oral exchange, there are circumstances where a lesser amount of negotiations or discussions may be appropriate. *See Messersmith v. General Services Administration,* MSPB Docket No. DC07528010253 (December 2, 1981). The Board specifically cited the case of *Peden v. United States,* 512 F. 2d 1089 (Ct. Cl. 1975), wherein the appellant was a criminal suspect and the parties went to the oral reply with no intention of discussing the factual issues. In that case, the court held:

> The "oral reply" was more of a cat and mouse game than a negotiation and in the circumstances, nothing more could have been expected. The regulations are apparently defective for not providing for this common situation and our *Ricucci* decision should have made it clear we are not speaking about an instance where the employee was also a criminal defendant. It does not mean that the "oral reply" is not required in such

> circumstances, but that deficiencies in mere ritual should not by themselves trip up an agency in an adverse action if the employee gets the substance of what was realistic to expect in the circumstances.

Id. at 1102.

In the instant consolidation, most of the appellants made an oral reply. The appellants who appeared for their replies did not, however, present explanations for their absence from duty at the time of the strike. The appellate records clearly reveal that, as in *Peden*, the union conducted a "cat and mouse" game with the agency during the reply process. The questions asked by the union representatives of the reply official related to peripheral or irrelevant issues. In no way did the representatives or the appellants attempt to join issue on the fundamental questions in the proceeding, that is, whether the appellants were on strike and AWOL on the dates charged. Nevertheless, the individual appellants were content to rely on their representatives to present their oral arguments. Thus, any failure in presenting their explanations for their absences was due to reasons wholly within the control of the appellants. *Ware v. Department of Education*, MSPB Docket No. SF07528010323 (July 30, 1982).

Appellant Lester E. Cooke testified that he appeared at the facility at 9:15 a.m. on August 18, 1981, to present an oral reply. He further testified that the agency had apparently scheduled his oral reply for 9:00 a.m. on that date and his designated representative, Robert Holda, appeared at the time and initiated the oral reply. Appellant Cooke stated that he requested to be allowed to enter the facility to make an oral reply and that his request was denied. Tr. 665-666, 674-677. He testified that, if he had been afforded a reply, he would have raised the defenses

mentioned at the hearing, that he was confused as to his individual deadline, that he was fearful about returning to the facility because he had seen a controller hauled off in shackles in South Carolina by law enforcement officers, and because he was afraid for the flying public. Tr. 667-670.

The agency submitted a document entitled Command Post Contact Form dated August 15, 1981, and signed by agency employee C. B. Hooper, which indicates that he contacted appellant Cooke on that date and scheduled his oral reply for August 18, 1981, at 9:00 a.m. Appellant Cooke's Skeleton File, Tab 4(7). At 9:00 a.m. on August 18, appellant Cooke's designed representative appeared without appellant and the scheduled reply was held. Thus, since the agency has demonstrated that appellant Cooke had actual notice of the scheduling of his oral reply, and since a reply was presented on his behalf, I find that there has been no procedural error committed.

Appellant Thomas G. Downs contends that he was improperly denied an oral reply. He testified that, despite his notice of proposed removal being sent to his legal address (his mother's residence), he did not receive it until August 14, 1981. The agency then found his undated request for an oral reply, received by it on August 21, 1981, to be untimely, and therefore denied his request for an oral reply. He testified that he believed that he had until August 21, 1981, to make an oral reply. Tr. 689, 698-700.

The appeal record indicates, however, that Rose Downs (appellant's mother) signed for his notice of proposed removal on August 10, 1981. Inasmuch as appellant's mother's address was his legal address, I find that constructive delivery of the proposal was made to appellant on August 10, 1981. Therefore, appellant had until August

17, 1981, to present a request for an oral reply. He did not do so until August 21, 1981. Appellant Thomas G. Downs' Skeleton File, Tab 4(3). I therefore find that no procedural error was committed by the agency in denying appellant Downs an oral reply. Moreover, even assuming arguendo that the agency committed a procedural error, there is no basis for finding that the error was harmful under the standards set out in *Parker v. Defense Logistics Agency,* 1 MSPB 489 (1980). Appellant Downs testified that he did not know what he would have said at an oral reply if he had been granted one. Tr. 708. Therefore, I do not find that "it was within the range of appreciable probability that (any) error had a harmful effect upon the outcome before the agency." *Id.* at 493

The appellants further contend that the entire adverse action process was a "sham" and a "futile ritual" because they were effectively removed on August 5, 1981, by virtue of the President's Rose Garden speech of August 3, 1981. While the President did indicate that strikers who did not return to work within 48 hours would be terminated, his speech did not refer to individual fact situations. Moreover, the appellants have not presented evidence that in any individual case the deciding official could not have chosen a penalty other than removal or no penalty at all. Finally, the President's proclamation was substantively little different from a publicly-announced agency policy of generally disciplining employees for inefficiency or poor attendance. I therefore find that no procedural error resulted from the President's speech. Similarly, I find no procedural error present in the widespread dissemination to agency officials of guidance or even instructions for processing the adverse actions against striking controllers. Appellants' Exhibit 2.

Finally, the appellants contend that the shortening of the notice period in these cases by the utilization of the crime exception by the agency was improper in that it had a chilling effect on the reply process. The appellants contend that they were afraid to speak openly during their oral replies for fear that they would be prosecuted.

The law provides that a federal agency may shorten the statutorily required 30-day period of advance written notice in circumstances where "there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed . . . ." 5 U.S.C.A. 7513(b)(1) (1980). Striking against the Federal Government is a criminal offense for which a sentence of imprisonment may be imposed. 18 U.S.C.A. 1918 (1980). In these cases, the agency clearly had "reasonable cause to believe" that the appellants were participating in the strike. Therefore, I conclude the agency properly relied upon the crime exception to shorten the notice period in the instant cases. *Schapansky, supra,* at 7; *Martin v. Department of the Treasury,* MSPB Docket No. AT075209044 at 8-10 (June 1, 1982).

An agency may take adverse action against employees under 5 U.S.C. Chapter 75 only for such cause as will promote the efficiency of the service. 5 U.S.C.A. 7513(a) (1980). In prior decisions, the Board has held that unauthorized absence from duty constitutes proper grounds for removal, since, by its very nature, it disrupts the efficiency of the service. *Bolling v. Department of the Air Force,* MSPB Docket No. NY07528090034 (December 28, 1981); *Desiderio v. Department of the Navy,* 4 MSPB 171 (1980). In this case, the appellants' participation in the strike, likewise, by its very nature, disrupted the efficiency

of the Federal Aviation Administration in completing its important mission of controlling air traffic throughout the United States. *Schapansky, supra,* at 12.

I further find that the penalties imposed in these cases were reasonable sanctions under all the facts and circumstances present. *Douglas v. Veterans Administration,* MSPB Docket No. AT075299006 (April 10, 1981). In *Douglas,* the Board articulated certain factors, some or all of which may be relevant in determining the reasonableness and appropriateness of the penalty to be imposed in a particular adverse action. The Board will consider whether a penalty is clearly excessive in proportion to the sustained charges, violates the principle of like penalties for like offenses, or is otherwise unreasonable under all the relevant circumstances. *Id.* at 28. In making such a determination, the Board recognizes that its function is not to usurp management's responsibility, but to insure that managerial judgment has been properly exercised within tolerable limits of reasonableness.

The most relevant factor relied upon by the agency in these cases is the statutory provision which holds that:

> An individual may not accept or hold a position in the Government of the United States . . . if he—
>
> * * *
>
> (3) participates in a strike . . . against the Government of the United States . . . .

5 U.S.C.A. 7311(3) (1980).

In light of the plain language of this statute, I find that the agency could reasonably impose a penalty of

removal.[4] In fact, the penalty of removal conforms with a literal reading of the statute.[5]

Moreover, even if the statute is viewed as not mandating that the agency remove a striker, the seriousness of the misconduct here would plainly override any favorable factors discussed in *Douglas* such as performance and length of service. Participation in a strike by a Federal employee constitutes both a violation of law and a complete breach of the employer/employee relationship. *Schapansky, supra*, at 10-11. As such, I conclude that the penalty of removal assessed by the agency is well within tolerable limits of reasonableness.

Finally, appellant Kolody attempted to return to work on August 8, 1981. It is undisputed that since he had missed his deadline shift for reporting to work, he was not allowed to work, but instead, was kept in a non-duty status without pay until August 26, 1981, the effective date of his removal. 5 U.S.C. 7501(2) defines a suspension as

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4. The legislative history of Section 7311(3) as well as the limited case law available on the subject provide precedent supporting a conclusion that 5 U.S.C. 7311(3) requires an agency to discharge strikers. Sen. Rep. No. 1380 to accompany H. R. 10104 at 19-21 (1966); Sen. Rep. No. 1256, 84th Cong., 1st Sess., reprinted in 1955, U.S. Code Cong. and Ad. News 2873; *American Workers Postal Union AFL-CIO v. U.S. Postal Service*, No. C-80-748 (N.D. Cal., April 11, 1980), *aff'd*, 682 F. 2d 1280, 1285 (9th Cir. 1982); *United States v. PATCO*, 504 F. Supp. 432, 438 (N.D. Ill. 1980), *rev'd* on other grounds, 653 F. 2d 1134 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 639 (1981); *United States v. PATCO*, 438 F. 2d 79 (2d Cir. 1978), *cert. denied*, 402 U.S. 915 (1971).

5. In *Woody v. General Services Administration*, MSPB Docket No. SF07528110028 at 3 (June 2, 1981), the Board discussed whether a lesser penalty than the prescribed minimum penalty set out under 31 U.S.C. 638(a)(c)(2) for illegal use of Government vehicles could be imposed. It held that "(s)ince appellant received the minimum penalty authorized by law, the agency cannot properly have chosen a lesser penalty." *See also Special Counsel v. Dukes*, MSPB Docket No. HQ1210600020 (October 29, 1981), in which the Board found that it could not order a lesser penalty not permitted by statute.

placement of an employee for disciplinary reasons in a temporary status without duties and pay. It is clear in this case that the agency kept appellant Kolody in a non-duty without pay status for disciplinary reasons, that is, because he allegedly participated in the strike and was absent without authorization. The agency in effect imposed a "constructive" suspension on appellant Kolody during the notice period. Since the period covered by the non-duty status was 28 days, he was affected by an adverse action covered under 5 U.S.C. 7512(2). An employee affected by such an adverse action is entitled to the procedural rights set out under 5 U.S.C. 7513(b). These rights include an advance written notice of at least 30 days, unless there is reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action; a reasonable time, but not less than seven (7) days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer; and a written decision and the specific reasons therefor at the earliest practical date.

Although the agency properly invoked the crime exception in 5 U.S.C. 7513(b) when it processed the removal action affecting the appellant, it did not follow any of the required statutory procedures when it effected the 28-day "constructive" suspension. While it is conceivable in this case that the agency could have made out a case for shortening the advance notice period when it suspended the appellant, it did not issue a notice advising him of a proposed suspension or allow him an opportunity to respond. Such an omission on the agency's part plainly constitutes harmful error. *See Kerr v. National Endowment for the Arts*, MSPB Docket No. BN07528010005 (April 9, 1981); 5 C.F.R. 1201.56(c)(3) (1982). Accordingly, appellant Kolody's constructive suspension lasting from Au-

gust 8 to September 26, 1981, may not be sustained under 5 U.S.C. 7701(c)(1)(A).

DECISION

The agency's adverse actions removing the appellants in the instant consolidation with the exception of appellant Weiss are hereby affirmed. The agency's decision removing appellant Weiss is hereby reversed. Finally, the agency is ordered to cancel its constructive suspension of appellant Kolody from August 8 through September 26, 1981.

The appropriate administrative officer is directed to furnish a copy of the documentation effecting the corrective actions detailed above to the St. Louis Regional Office, Merit Systems Protection Board, 1520 Market Street, Room 1740, St. Louis, Missouri 63103, within ten (10) calendar days after the decision becomes final. Any party seeking enforcement of a final decision of the Board may file a petition for enforcement with the regional office that rendered the initial decision. Such petition should be directed to the Regional Director and must comply with the requirements of 5 C.F.R. 1201.181(a).

NOTICE

This decision is an initial decision and will become a final decision of the U.S. Merit Systems Protection Board on January 6, 1983, unless a petition for review is filed with the Board within thirty-five (35) calendar days after the date of this decision.

Any party to this appeal, the Director of the Office of Personnel Management (OPM) or the Office of Special Counsel may file a petition for review of this decision with the U.S. Merit Systems Protection Board. The Director may request review only if he/she is of the opinion that the decision is erroneous and will have a substantial

impact on any civil service law, rule, or regulation under the jurisdiction of the Office. 5 U.S.C.A. 7701(e)(2) (1980). The petition must identify specifically the exception taken to this decision, cite the basis for the exception, and refer to applicable law, rule, or regulations.

The petition for review must be filed with the Secretary to the U.S. Merit Systems Protection Board, Washington, D.C. 20419, no later than thirty-five (35) calendar days after the date of this decision. If a petition for review is filed, an informational copy of it should be forwarded to this office.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tend to show that:

(a) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(b) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

Pursuant to 5 U.S.C. 7703(b)(1)[6] the appellant has the right to seek judicial review of the Board's final decision on this appeal. A petition requesting such review must be filed with the U.S. Court of Appeals for the Federal Circuit in Washington, D.C., no later than thirty (30) days after appellant's receipt of the Board's final order on this appeal.

For the Board:

/s/ Jack E. Salyer
Jack E. Salyer
Presiding Official

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6. As modified by Section 127 of the Federal Courts Improvement Act of 1982, to be codified at 28 U.S.C. 1295(a)(9).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 83-1153
SL075281F0347

KIPP ANDERSON, ET AL.,
Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, FAA,
Respondents.

JUDGMENT

ON APPEAL from the Merit Systems Protection Board This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: AFFIRMED.

DATED May 18, 1984

ENTERED BY ORDER OF THE COURT

George E. Hutchinson, Clerk
/s/ George E. Hutchinson
Clerk

ISSUED AS A MANDATE: June 11, 1984

COSTS: Against, Petitioners

PRINTING $234.64

TOTAL $234.64